No. 216.

Brief of Noyes, for P. E.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 216.

THE NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,

Plaintiff in Error.

vs.

OCONTO CITY WATER SUPPLY COMPANY,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

GEO. H. NOYES,

Counsel for Plaintiff in Error.

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BRIEF OF PLAINTIFF IN ERROR.

The case comes here on writ of error to the Supreme Court of the State of Wisconsin. The action was brought in the circuit court of the state, for the posession and use of a certain water plant in the city of Oconto, and to enjoin the defendant from using the same, or any part of the material furnished for such plant, unless the defendant should pay to the plaintiff the amount adjudged due to it for materials which it furnished in the construction of the plant and for which it obtained a mechanic's lien decree against the Oconto Water Company. (Record, pp. 17-25.)

It appears from the admissions in the pleadings and the proofs offered that the plaintiff in error made a contract on the 28th day of August, 1890, with the Oconto Water Company, a corporation of Wisconsin, to furnish the iron pipe necessary to be used in the construction of its water works plant in the city of Oconto, and that the delivery of such pipe commenced in the city of Oconto on the 8th day of September, 1890, and the work of construction on the plant began on the 15th day of September, 1890. On the 28th day of January, 1891, the plaintiff in error filed its claim for a lien upon the

plant, and on the 30th day of January, 1891, its bill of complaint in the United States Circuit Court for the Eastern District of Wisconsin in equity for the purpose of foreclosing its lien against the plant, making the Oconto Water Company the sole defendant. The defendant contested the case on the ground among others, that a mechanic's lien could not be enforced against the property of a water company. A decision was made in favor of the complainant, which, upon appeal by defendant, was affirmed by the Circuit Court of Appeals.

Oconto Water Co. vs. National Pipe Works, 18 U. S. App. 380.

A decree was rendered on the 3rd day of October, 1892, adjudging the amount due to the plaintiff in the sum of $25,637.32, and that such sum was a lien "upon the well, buildings, machinery and the entire water works plant of said defendant in the city of Oconto, Wisconsin, and upon all the right, title and interest which the defendant Oconto Water Company had in and to the premises hereinafter described from and after the date of the commencement of the construction of said well, buildings, machinery and water works plant upon which said lien is claimed, to-wit, the 15th day of September, 1890, or which said defendant or any and all persons claiming under it have since acquired therein."

It was further decreed:

"That the aforesaid well, buildings, machinery and entire *water-works plant* and all the aforesaid right, title and interest of the said defendant or of any person claiming under it in and to the premises upon which said plant is located, hereinafter described, and the *franchise of maintaining and operating the said plant for the uses to which it is devoted by the law of the defendant's incorporation as an entirety*, be sold at public auction by or under the direction of the marshal of this court; that said marshal give public notice of the time and place of such sale in the manner provided by the statutes of the state of Wisconsin for the sale of real estate on execution, and that such sale be absolute without redemption; that said marshal make, execute and deliver to the purchaser or purchasers, on compliance with the terms of such sale, a deed or deeds of the property and premises so sold, setting forth the property and land so sold and the sum paid therefor, and that *he bring the proceeds of such sale*, after deducting the amount of his fees and expenses of such sale, *into the registry of this court for distribution among all who may show right thereto* and *subject to the order of the court thereon*; that said marshal make a report

of such sale and file the same with the clerk of this court within ten days from the date of the sale.

It is further ordered, adjudged and decreed that after the filing of said report of sale and the confirmation thereof the defendant, Oconto Water Company, and all persons claiming under it, or any or either of them, be, and they are, and each of them is hereby forever barred and foreclosed of all right, title, interest and equity of redemption in and to said premises so sold, or any part thereof."

(Here follows a description of the real estate mentioned.) (Record p. 19.)

Pursuant to the terms of such decree, the marshal made sale of the property and franchises mentioned therein on the 23rd day of August, 1897, and on the 27th day of August, 1897, executed and delivered to the plaintiff in error a deed of the property and franchises so sold, which sale, deed, and report of the marshal were duly confirmed by the court on the 28th day of August, 1897. (Record p. 15.)

The marshal's deed conveyed to the plaintiff in error the well, buildings, machinery and entire water works plant of the Oconto Water Company, and all the right, title and interest which said company, or any person claiming under it, and the premises upon which the plant was located, and the franchise of maintaining and operating the plant for the uses to which it was devoted by the law of the incorporation of the company, as an entirety, together with all the right, title and interest which the Water Company had in and to the premises on, from and after the 15th day of September, 1890, or which the Water Company or *any and all persons claiming under it have since acquired*, the real estate upon which the well, buildings and machinery are located being specifically described in the deed. (Record pp. 20-21.)

On the 17th day of June, 1891, S. D. Andrews and W. H. Whitcomb commenced an action in the state court, to-wit, the Circuit Court of Oconto County, against the Oconto Water Company, sole defendant, praying for a judgment against the defendant for the amount of advances made by them under two separate instruments of contract or mortgage and that the amount of such judgment "be decreed to be a lien upon the securities assigned and pledged by the defendant to the plaintiffs in accordance with the provisions of the contracts and agreements between them of date September

13, 1890, and March 13, 1891," and that the same be sold to pay the amount of such judgment. (Record pp. 147-159.)

The so-called mortgage dated September 13, 1890, was not executed and delivered so as to go into effect until on or about the 18th day of September, 1890, *subsequent to the date of the commencement of the mechanic's lien of the plaintiff in error.* (Record pp. 16, 23, 44, and 45.)

Such mortgage dated September 13, 1890, purported to transfer to Andrews & Whitcomb "all the rights, privileges, immunities, franchises and powers, of whatsoever name or nature, which were granted unto the said Oconto Water Company in and by that certain ordinance passed by the common council of the city of Oconto and approved by the mayor of said city on the 9th day of July, A. D. 1890, said ordinance being ordinance No. 153 of said city and being entitled 'An ordinance providing for a supply of water to the city of Oconto, Wisconsin, and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns, to construct, operate and maintain water works therein,'" as security for the performance by said company of its agreement to repay to Andrews & Whitcomb such moneys, not exceeding forty thousand dollars ($40,000) as they should thereafter advance for the purpose of constructing the water plant. (Record pp. 101-104.) As additional security for the repayment of such sums, the Oconto Water Company agreed to issue to Andrews & Whitcomb its entire one hundred thousand dollars ($100,000) of capital stock and one hundred thousand dollars ($100,000) of its first mortgage bonds, secured by a deed of trust on the water works and franchises of the company. There was no provision covering after-acquired property or rights. (Record p. 102.)

The agreement or so-called mortgage of March 13, 1891, was, pending the mechanic's lien foreclosure suit, executed by the Oconto Water Company to Andrews & Whitcomb to secure additional advances for the construction of the plant not exceeding twelve thonsand dollars ($12,000), such advances "secured by the securities now held and possessed by said first party as collateral to the loan made under said contract of September 13, 1890." (Record pp. 116-119.)

Judgment was entered by default in such action in the state court on the 13th day of August, 1891, in which, among

other things, it was adjudged that the plaintiffs had a lien upon the property described in the complaint and covered by the two contracts or mortgages, consisting:

1st. Of all the rights, privileges and franchises granted by the ordinance of the city of Oconto,

2nd. Of the $100,000 of capital stock,

3rd. Of $100,000 of first mortgage bonds,

and ordering that the referee named make sale of such property and that such sale and its confirmation should vest in the purchaser "the absolute legal title in and to all of the property so sold, free and clear of all rights, claims, or equity or equities of redemption of the defendant and *of all persons whomsoever claiming by, through or under said defendant subsequent* to the acquirement by the plaintiffs of their rights, interests, and claims under the contracts between them and the defendant set forth in the complaint herein." (Record p. 162.) Sale was made of said property by the referee on the 12th day of September and the referee reported to the court that he had "given to said plaintiffs as purchasers of the said property at such sale an instrument or bill of sale in writing," which bill of sale purported to transfer to Andrews & Whitcomb the ordinance rights, the stock and bonds described in the judgment. (Record pp. 124-126.)

On the 29th day of September the court ordered that the report of the referee be confirmed. (Record p. 127.)

The complaint of the plaintiff in error in the action at bar alleged:

> "That by virtue of said mechanic's lien decree and said sale and said marshal's deed, this plaintiff became and now is the owner and holder of all the right, title and interest which said Oconto Water Company had or has since acquired in and to said water plant and all the property and franchises belonging to or connected therewith, on and since the 15th day of September, A. D. 1890, which *title* to said plant, said plaintiff alleges, *is prior to any lien upon or title to said plant now or at any time held or acquired by said defendant.*" (Record p. 15.)

Said complaint further alleged that after the purchase by Andrews and Whitcomb under their foreclosure judgment,

> "they entered into possession of said entire water plant including the pipe so furnished by the said plaintiff to said Oconto Water Company, and so continued in possession thereof until, as this plaintiff is informed and believes, on or

about the 25th day of July, A. D. 1892, when the said Andrews and Whitcomb transferred to said defendant all their right, title and interest in the said ordinance rights and franchises so purchased by them under said judgment of foreclosure and sale, and thereupon said defendant took possession of said entire water plant or system so constructed by said Oconto Water Company, including the pipe furnished by this plaintiff to said Oconto Water Company, and has since continued the possession and use and received the rents, issues and profits of said plant and of said pipe as a part thereof, and is now in possession and use of all of the same." (Record p. 16.)

The complaint further alleges that the Oconto City Water Supply Company was organized as a corporation about the 7th day of July, A. D. 1892, under and pursuant to the provisions of Section 1788 of the Revised Statutes of Wisconsin, for the express and only purpose, as stated in its articles of organization, to-wit:

"For the purchase of S. D. Andrews and W. H. Whitcomb, both of the village of Norway, Oxford County, in the state of Maine, and of enjoying, maintaining and operating all of the rights, powers, immunities, franchises and property of every kind, name or nature, both real and personal, acquired and now owned and held by them under and by virtue of a decree of foreclosure and sale, made, rendered and entered in the Circuit Court of Oconto County, state of Wisconsin, on the 13th day of August, A. D. 1891." (Record pp. 13-14).

The complaint further alleged that Andrews and Whitcomb paid only a few dollars to defray expenses of sale upon their bid at the sale under their foreclosure judgment but were credited thereon the amount adjudged due them under their mortgages or pledges, and that upon the sale by Andrews and Whitcomb to the defendant there was nothing paid in cash but Andrews and Whitcomb received, in consideration of their conveyance, only capital stock of the defendant as provided in its articles of incorporation. (Record p. 17.)

The answer of the defendant consisted substantially of admissions of all the allegations of the complaint, except that it denied that the plaintiff was the owner or holder of any right, title or interest in or to the water plant or any pipe constituting any part of the same, and that it had availed itself of any property of the plaintiff which had not been paid for. It admitted entering into the possession and use of the

plant and alleged that it owned and controlled the same. (Record pp. 22-24.)

An amendment to the answer, permitted by the court, alleged as an estoppel by *res adjudicata* "that on or about the 5th day of October, 1896, a judgment was rendered in an action pending in the United States Circuit Court of Appeals for the Seventh Circuit, wherein the plaintiff in the lien decree mentioned in the complaint was plaintiff and the defendant in said decree and said S. D. Andrews, W. H. Whitcomb, The City of Oconto, this defendant and others were defendants, whereby it was adjudged that said lien decree was of no effect against this defendant or said Andrews and Whitcomb; that as to this defendant and said Andrews and Whitcomb and all of the world except the defendant in said decree the plaintiff had and there could be no lien on the premises and property described therein and in said decree; that this defendant and Andrews and Whitcomb purchased, held and owned said premises and property by claim and title paramount and free and clear of any claim or lien of said plaintiff, and that by the laws and policy of Wisconsin, under which the plaintiff claimed said lien and under which it existed, if at all, there was and could be no lien; that said determination is reported in volume 76 of the Federal Reporter on pages 166 to 176, and was adhered to by said court in volume 77 of said Reporter, at pages 774 to 778; that thereupon said court issued its mandate therein to the trial court, viz., the United States Circuit Court for the Eastern District of Wisconsin, accordingly, and, upon the same being there received and filed, judgment in accordance therewith was on the 29th day of July, 1897, duly rendered and entered in said court, which judgment has never been appealed from, modified or altered." (Record pp. 27-28.)

Upon the trial of this action under such issues (1) the court found the facts in reference to the proceedings to foreclose the mechanic's lien, the sale of the property under the decree to the plaintiff in error the deed and confirmation af sale, and also the foreclosure proceedings in the state court instituted by Andrews and Whitcomb, the sale under the judgment therein, the deed, the bill of sale of the franchise, stock and bonds covered thereby and the taking possession by them of the entire water works plant.

It was further found that after the 1st day of December, 1890, Andrews and Whitcomb knew that the plaintiff in error was furnishing the pipe used in the construction of the water plant and had not been paid for the balance remaining due on account thereof, and that on January 13, 1891, they were

informed that the plaintiff claimed a lien on the plant for such pipe. (Record p. 32.) Upon this point, it appeared in an answer of Andrews and Whitcomb introduced on the part of the defendant, that public notice was given on behalf of the plaintiff in error at the sale under the judgment in the state court at which Andrews and Whitcomb became the purchasers, that it claimed a lien upon the property of the Water Company paramount to any rights of Andrews and Whitcomb therein. (Record p. 96.)

(2) The court further found that in the suit instituted by the plaintiff in error in the Circuit Court of the United States against Andrews and Whitcomb, the defendant in error and others plead as *res adjudicata*, the decree of the Circuit Court was reversed by the Court of Appeals and thereupon a final decree upon rehearing was entered on the 29th day of July, 1897, in accordance with the mandate of the Court of Appeals, which decree has never been appealed from, modified or altered. (For such decree see Record p. 140-146.)

> It was further found that in and by such decree "it was decided that the said mechanic's lien decree of said complainant was binding on the said Oconto Water Company, but that it was not binding on this defendant, Oconto City Water Supply Company; that as to this defendant, complainant never had any mechanic's lien; that the issues raised by the pleadings in said Federal Court as to the existence and supremacy of such lien against this defendant were the same as in this case, and that the questions there decided are the same as are involved in this case, and that the questions there decided became by the decree of this court *res adjudicata* between the parties hereto." (Record p. 32.)

As *conclusions of law*, the court found:

1st. That the plaintiff has not and *never had any lien on the water works plant and property* upon which it claims such lien.

2nd. That the defendant holds and owns said plant and property by claim and *title paramount and free and clear of any lien of the plaintiff*.

3rd. That the plaintiff is not entitled to *any* of the relief demanded in the complaint as amended or otherwise.

4th. That the defendant is entitled to judgment on the merits, dismissing the complaint and action. (Record p. 32.)

Due exceptions were taken on behalf of the plaintiff to present the errors assigned. (Record p. 33).

The judgment entered provided:

"That the plaintiff has not and *never had any lien on the water works plant* and property on which it claims such lien by its complaint in this action; that the defendant holds and owns said plant and property by claim and *title paramount to and free and clear of any claim or lien of the plaintiff;* that the plaintiff is not entitled to any relief demanded in the complaint, as amended or otherwise." (Record p. 36.)

The trial Judge held, as appears from the opinion filed by him, that "the facts are that under the laws of Wisconsin the plaintiff has no lien. The only claim of lien is under a statute of Wisconsin, which gives no lien."

"The plaintiff never had any lien. Such is the settled law of this state, and the judgment in the case in the Federal Court is proof conclusive on the question." (Record pp. 34-36.)

The opinion filed in the Supreme Court, after discussing other questions, says:

"It is further contended that the state court had no jurisdiction to decree the foreclosure and sale under the mortgage, because prior to the commencement of the foreclosure action the Federal Court had acquired jurisdiction to enforce appellant's lien, which drew to that court all questions of the rights of the mortgagees."

The opinion then proceeds to consider this question and concludes that the commencement of a suit in the Federal Court to enforce a mechanic's lien on property does not preclude the foreclosure of a mortgage on the same property in the state court. The court said:

"The lien action was not *in rem* except in a qualified sense. *There was no seizure of the property and no possession of it taken by the court or necessary to the lien action at any stage of it.* The situation was essentially different from one where the property is in the actual custody of the Federal Court."

"The mere fact that the suit is pending in the Federal Court on one cause of action or subject of action affecting property not in the custody of the court does not prevent the commencement or prosecution of any number of other actions between other parties on other cases or subjects of action affecting the same property, or prevent the property from being seized in such other actions, so long as no prior possession of the *res* by the Federal Court is disturbed."

"Thus it is seen that identity of subject of action or disturbance of *actual* possession is what limits exclusive jurisdiction of the Federal Court as applied to this case. In that view it is readily seen that the proceedings in the state court to foreclose the Andrews and Whitcomb mortgages *did not conflict in the slightest degree* with the jurisdiction of the Federal Court to enforce appellant's lien against the Oconto Water Company." (Record pp. 183-184.)

Another question decided by the Supreme Court was the "claim that the court erred in granting affirmative relief to respondent." It was decided that under the answer of the respondent, the trial court was justified in granting affirmative relief in its judgment to the extent of the decision in the Federal Court decree, to-wit: "That the plaintiff has not and *never had any lien* on the water works plant and property on which it claims such lien by its complaint in this action; that the defendant holds and owns said plant and property by a claim and *title paramount to and free and clear of any claim or lien of the plaintiff.*" (Record pp. 184-185.)

The court in its opinion further stated that the respondent "is *legally* in possession of the mortgage property with at least the rights of mortgagees so circumstanced" and that it could not be ousted from that possession without payment of the mortgage indebtness, "nor can it be made to pay *junior* liens as conditions of enforcing its *primary* right." (Record p. 183.)

Assignments of Error.

The assignments of error are found in the record on pages 5-9. Not intending to waive any by omitting to set them out here in full, they are substantially as follows:

1st. A title and right to the franchises and property conveyed to the plaintiff in error upon the sale and deed of the United States Marshal under the mechanic's lien decree of October 3, 1892, in the United States Circuit Court for the Eastern District of Wisconsin, which sale was confirmed by the court, were denied by the Supreme Court of the State of Wisconsin affirming the judgment of the Circuit Court of Oconto County. (See Assignments of Error Nos. 1, 2, 3, and 4, Record pp. 5-6.)

2nd. The judgment of the Circuit Court of Oconto County, affirmed on appeal by the Supreme Court of the State of Wisconsin, denied to the plaintiff in error *any right*

or title to the property covered by said mechanic's lien decree and adjudged that the defendant in error holds and *owns said property by claim and title paramount to and free and clear of any claim or lien of the plaintiff in error.* (See Assignments of Error 5 and 7, Record pp. 6-7.)

3rd. The Supreme Court of the State of Wisconsin, affirming the judgment of the Circuit Court of Oconto County, *refused to give to the plaintiff in error the possession and use of the property covered by such marshal's deed* and refused to enjoin the defendant in error from occupying, possessing or using the same or any of the material furnished by the plaintiff in error, being a part of the water plant operated by the defendant in error, and refused to enjoin the defendant in error from occupying or using such plant or said pipe, unless within a reasonable time the defendant in error should pay to the plaintiff the amount due under its said mechanic's lien decree. (See Assignment of error No. 8, Record p. 7.)

4th. The Supreme Court of Wisconsin decided that the United States Circuit Court for the Eastern District of Wisconsin did not have and acquire exclusive jurisdiction of the subject matter of the suit in which the plaintiff in error acquired its title and right to the property under its marshal's deed and that said action did not draw to said court all questions regarding the rights and claims of all parties having claims against said property, and further decided that the Circuit Court for Oconto County, State of Wisconsin, took and acquired jurisdiction in the proceedings instituted in said court by Andrews and Whitcomb against the Oconto Water Company to foreclose their mortgages upon the same property and to render a decree of foreclosure in such suit and to order a sale of said property, and to confirm referee's report of said sale, and to give legal right, title and possession to Andrews and Whitcomb, the purchasers at the said sale under said foreclosure proceedings. (See Assignment of Errors No. 9, Record p. 7.)

5th. The Supreme Court of the state of Wisconsin decided that the United States Circuit Court for the Eastern District of Wisconsin, in the action brought by the plaintiff in error to foreclose its mechanic's lien, did not acquire exclusive jurisdiction of the *res* in said suit, because it only took *constructive*

possession of the *res* and did not have the *actual custody* thereof, and that exclusive jurisdiction over the subject matter of said suit did not obtain because there was no disturbance of the *actual* possession of the *res* in Andrews and Whitcomb instituting their foreclosure proceedings and selling the property under the judgment therein. (See Assignment of Error No. 10, Record p. 7.)

6th. The Supreme Court of the State of Wisconsin granted affirmative relief to the defendant in error under the pleadings in this action, and beyond the issues herein and the issues in the suit in the Federal Court, by adjudging that it holds and owns the property by title paramount to and free and clear of any claim or lien of the plaintiff in error. (See Assignment of Errors No. 11, Record p. 7-8.)

7th. The Supreme Court of the State of Wisconsin affirming the judgment of the Circuit Court of Oconto County, decided against the title, right and privilege of the plaintiff in error, which it claimed under the authority exercised and granted to it by the mechanic's lien decree, dated October 3, 1892, in that said state court decided that the decision in the action commenced in the Circuit Court of the United States for the Eastern District of Wisconsin, wherein the plaintiff in error was complainant and the said defendant in error, and Andrews and Whitcomb and others were defendants, and the issues raised by the pleadings and therein determined were the same as are involved in this cause, and that such decision was *res adjudicata* in this case between the parties. (See Assignments of Errors No. 12, Record p. 8.)

8th. The Supreme Court of the State of Wisconsin decided that by virtue of the final decree entered in the United States Circuit Court for the Eastern District of Wisconsin, dated July 29, 1897, the plaintiff in error did not hold or own said property by title paramount to that of the defendant in error, but that the defendant in error, under and by virtue of such decree, holds and owns said property by claim and title paramount to and free and clear of any claim or lien of the plaintiff in error. (See Assignments of Error Nos. 13, 14, and 15, Record pp. 8-9.)

9th. The state court construed the mechanic's lien foreclosure proceedings invalid, and deprived the plaintiff in error

of the *vested interest* in and title to the property obtained by it under its decree and marshal's deed by holding that such title could be divested by a subsequent decision of the Supreme Court of the State of Wisconsin construing the mechanic's lien statutes in a manner different from the construction which had been placed upon them at the time of the making of the contract with the plaintiff in error and the decree recognizing and enforcing its lien thereunder. (Assignment of Error 16, Record p. 9.)

ARGUMENT.

I.

The Writ of Error Will Lie to this Court.

(1) The state court failed to recognize the validity of, and to give due effect to, the decree of the United States Circuit Court for the Eastern District of Wisconsin under and by virtue of which the plaintiff in error acquired and claims its title to the property in question, thus presenting a federal question.

DuPasseur vs. Rochereau, 21 Wall. 130.
Embry vs. Palmer, 107 U. S. 3.
Crescent Live Stock Co. vs. Butchers' Union, 120 U. S. 141.
Pittsburg Ry. Co. vs. L. & T. Co., 172 U. S. 493.
Green Bay Canal Co. vs. Paper Co., 172 U. S. 58.
Hancock Nat'l Bank vs. Farnum, 176 U. S. 640.
Avery vs. Popper, 21 Sup. Ct. Rep. 94.

The state court, in the opinion filed, recognized that its decision was based upon the ground of the federal question involved, and that this was essential to sustain its judgment. If the state court had no jurisdiction to sell and transfer the title and possession of the *res* over which the federal court had acquired prior jurisdiction, the judgment of the state court cannot be sustained. This question of jurisdiction was raised and specifically considered at length in the opinion of the court filed (Record pp. 183-184). It was considered necessary to the determination of the issues involved regardless of the question of *res adjudicata* discussed in the opinion. (Record p. 182.) Consequently it cannot be claimed that the judgment of the

state court was based upon a question sufficient to sustain it, not involving a federal question, within the doctrine of

Eustis vs. Bolles, 150 U. S. 361.

Pierce vs. Somerset Ry., 171 U. S. 640.

(2) The state court gave *undue* effect to the judgment of the state court under which defendant in error claimed title; and also gave *undue* effect to the decree of the federal court under which defendant claimed its right by *res adjudicata*. Whether the defendant in error obtained such rights or title or lawful possession as it claimed by virtue of such judgment or decree is a federal question which this court will review.

Reynolds vs. Stockton, 140 U. S. 254.

See also cases above cited.

The plaintiff in error is not estopped to assert its title to the property sold under the mechanic's lien decree, if as we contend, due effect and due faith and credit only are given to the decree plead as *res adjudicata* on the question of such title. "Both the parties therefore rely upon rights under federal authority and as the right of plaintiff in error was denied by the court the writ of error lies."

Factor's Ins. Co. vs. Murphy, 111 U. S. 738-41.

II.

The answer of the defendant in error does not raise the question of the invalidity or binding effect of the mechanic's lien decree or the title obtained thereunder by virtue of the sale, marshal's deed and the confirmation thereof by the Court.

There is no allegation in the answer that the mechanic's lien decree of the plaintiff in error was void for want of jurisdiction of the parties or of the subject matter, or because it was obtained by fraud or collusion, or that it was entered for a larger amount than was due, *or that it was not authorized by the mechanic's lien statute*, or that it was in any respect illegally or erroneouly entered. In other words, no issue was raised by the pleadings as a basis for an attack upon such decree collaterally on these grounds or any other grounds.

Conceding for the argument that the defendant in error, as a stranger to the decree, was not bound by it and had the right

to attack it for any reason in this collateral suit, it could only do so by proper allegations in its answer setting forth the grounds of such attack and then submitting affirmative proofs in support of its allegation. Proofs tending to support such allegations, if any be found in the record, were inadmissible and may be disregarded. (*R. R. Co. vs. Bradley*, 10 Wall., 299-303.) The admissions in the answer were sufficient to support a decree in favor of the plaintiff in error unless its right thereto be barred under the remaining portion of the answer setting up a former adjudication supported by the proofs offered in evidence to sustain such allegation. Portions of a record in a former action were offered in evidence to support the plea of *res adjudicata*, and this being its sole legitimate purpose the contents of the same are not to be considered as evidence for any other purpose. They cannot be used as affirmative evidence of the invalidity or nugatory effect of the plaintiff in error's title.

Upon the pleadings therefore the title of the plaintiff below stood unimpeached and admitted.

III.

The plaintiff in error proved title to the property and franchise of the Oconto Water Company by the record, marshal's deed and order of confirmation in the suit brought to foreclose its mechanic's lien.

This record and deed were admissible for the purpose of establishing such title, since both plaintiff in error and defendant in error traced their respective titles to the property to the same source, to-wit: the Oconto Water Company.

Hewitt vs. Butterfield, 52 Wis. 384.

> "It is true that, in general, judgments and decrees are evidence only in the suits between parties and privies. But the doctrine is wholly inapplicable to a case like the present, where the decree is not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title, and constituting a part of the muniments of his estate; without estblishlishing the existence of the decree, it would be impossible to establish the legal validity of the deed from Robert Johnson to the lessors of the plaintiffs, which was made under the authority of that decree; and under such circumstances to reject the proof of the decree would be, in effect, to

declare that no title derived under a decree in chancery was of any validity except in a suit between parties and privies, so that in a suit by or against a stranger, it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta.*"

Barr vs. Gratz's Exrs., 4 Wheat, 220.

Bandin vs. Raliff, 1 Mart., U. S. (La.), 165, (14 Am. Dec., 181).

"The authenticity of the record was not disputed, and if it had any legal bearing whatever on the title of the plaintiff, the defendants, who had as yet shown no title, can not object to the muniments of plaintiffs' title, when offered in evidence, whether they be deeds, wills, or partitions, 'because they are *res inter alios acta*'."

Webb et al. vs. Den., 17 How., 576, p. 579.

"It becomes evidence, not only of the rendition of the judgment, but of its *legal effect.*"

2 Jones on Evidence, §607.

Crescent Live Stock Co. vs. Butchers' Union, 120 U. S., 141-157-160.

IV.

The mechanic's lien, decree, sale, marshal's deed on sale and order of confirmation were conclusive not only as against the Oconto Water Company, but as against the defendant in error, unless attacked for want of jurisdiction in the Court or for fraud or collusion.

No such defense was raised by pleading or by proof.

Not having been so attacked, the record was conclusive as against the defendant in error of the fact and amount of the indebtedness of the judgment debtor and of the lien of the plaintiff in error for the debt as established in the decree and the acquiring by the purchaser at the sale of all the right, title and interest which the Oconto Water Company had in and to the premises on and after September 15, 1890.

Candee vs. Lord, 2 N. Y., 269, 51 Am. Dec., 294.

1 Black on Judgments, §260.

2 Black on Judgments, §605.

Freeman on Judgments, §335, 418.

Wells res Adjudicata, pp. 150-1.
Bigelow on Estoppel (5th Ed.), 150-2.
Lauman's Appeal, 8 Pa. St., 473-7.
Hall vs. Spaulding, 40 N. J. L., 166.
Naylor vs. Mettler, 11 At. Rep., 859 (N. J.).
Swiggart vs. Harber, 4 Scam. (Ill.), 364.
Oakes vs. Williams, 107 Ill., 154.
Pickett vs. Pipkin, 64 Ala., 522.
Sidens vs. Parker, 52 Me., 481-5.

If the court had jurisdiction of the subject matter and the parties, it had jurisdiction to decide wrong in the interpretation of the statute, but, however erroneous the court may have made the judgment, it is binding on all who may attack it collaterally.

U. S. vs. Insley, 150 U. S., 512.
Ehrsam vs. Smith (Kans.), 60 Pac. Rep., 740.
Andrews vs. Foundry & P. W., 46 U. S. App., 619-22.

While this rule of the conclusive effect of a judgment or decree is supported by the weight of authority, there are cases which hold that upon proper allegations or objections an inquiry may be made collaterally as to the *amount and character* of the claim upon which the judgment sought to be impeached was entered so as to overcome its *prima facie* effect when offered in evidence.

In *McCoy vs. Quick*, 30 Wis., 521, the answer averred that a mechanic's lien judgment through which the plaintiff claimed title to the property had been entered upon an indebtedness *which had been theretofore fully paid*, and that only a small part of the material furnished by the judgment creditor for which he claimed a lien had been *actually used* in the erection of the structure upon the property. Testimony was offered in support of these allegations in the answer, which testimony the court rejected. It was held that the lien judgment was not conclusive upon the defendants, who were not parties to the action, but that they might show the facts set up in their answer, as a contrary holding "would open a wide door for the perpetration of most flagrant frauds."

But the court laid down the further rule as follows:

"We think the lien judgment is *prima facie* evidence in this action of the extent and amount of the plaintiff's lien on the premises, in the same manner that a mortgage on the premises (had one been given), executed by Doering (owner) to the plaintiff, and recorded June 27, 1868, would be *prima facie* evidence of the extent of the lien thereby created, as against the defendants or any other subsequent purchasers or encumbrancers of the same premises. Indeed, it seems to us that the effect of the lien judgment is the same, as against these defendants, as would have been the effect of a mortgage on the same premises for $600, duly executed by Doering to the plaintiff, and recorded June 27, 1868, (the date of commencement of the lien adjudged.) In the one case the lien is created, or at least vitalized, by the judgment of the court, and in the other it is created by the act of the parties. In either case it is only a lien, and there seems to be no good reason for holding that there is any difference in the two cases, as regards the rights of subsequent purchasers, to contest the validity or amount of the lien, or to redeem therefrom."

So *Hassall vs. Wilcox*, 130 U. S., 493, presented a somewhat similar question, although that case is clearly distinguishable from the case at bar in the following respects: In that case the mechanic's lien was *subsequent* to the mortgage, while in this case the lien is *prior* to the mortgages.

In that case the judgment declaring the lien was entered by *confession under power of attorney*, while in this case the defendant appeared, interposed an *answer*, raised all questions which could possibly be urged against the amount, character and validity of the claim and lien, including the question now raised, and the judgment entered establishing the lien was upon appeal affirmed.

In that case objections were duly made to the allowance of the lien on the ground (1) that the judgment in favor of the lien claimant "was obtained by *fraud and collusion*"; (2) that the note upon which the judgment was entered was without consideration and *fraudulent*, and (3) that for the purpose of defeating the lien of the mortgage the lien claimant *falsely* represented that the claim was for services and amounts advanced which entitled the lien holder to a lien prior to all others, whereas in fact there had been no services performed which entitled him to any such lien. The court below, notwithstanding these objections, held that testimony was not

admissible in proof of the objections filed to the lien, but that the judgment was conclusive evidence as against the mortgagees. This court held that as the claim of the mechanic's lien creditor originated after the mortgage was made, the mortgagees had the right to "compel him to prove affirmatively in that (Circuit) court the existence and priority of his lien under the statute of Texas." The lien claimant undertook to do so and the master reported that the note on which the judgment was predicated included certain amounts not secured by a lien under the statute, and that he had no lien prior to the mortgage. The Circuit Court sustained the objections filed by the lien claimant and awarded him a prior lien for the full amount of his judgment. This court said: "We do not think the evidence before the master sustained the lien for the whole amount of that note," and further said that the proceedings in the state court could not be sustained as one strictly *in rem* wherein it is essential that constructive notice to adverse claimants to appear and maintain their rights is essential before a judgment can operate even as *prima facie* evidence, citing *Windsor vs. McVeigh*, 93 U. S., 274.

In the case so cited it was held that a judgment was not binding in proceedings of confiscation instituted against the owner, in which he was required to appear and plead, and upon his putting in an appearance and offering to plead he was not allowed to do so because of his residence in a state in rebellion. It was held that the judgment was *void for want of jurisdiction*, as the court could not proceed against the owner after he had been refused the right to appear and have his day in court to contest the claim made against the property.

In the *Hassall vs. Wilcox* case, the decree of the court was reversed and the cause remanded to the court below with direction to allow a re-examination of the claim of the mechanic's lien creditor on the same and further proofs, if desired. The rule in that case does not differ from the doctrine in *Candee vs. Lord, supra*, and other cases cited, because the attack by due pleadings was made on the judgment as being void for fraud and collusion. In the case at bar no such attack is made by the pleadings or otherwise.

And so in *Southern Ry. Co. vs. Bouknight* (Cir. Ct. App., 4th Cir.), 70 Fed. Rep., 442, Chief Justice Fuller, delivering

the opinion, held that a judgment roll was admissible in evidence against the objections of mortgagees not parties thereto, "not simply as establishing the fact of its rendition, but as proof of when the action was brought, what for, and the amount. Being conclusive as to each of these matters as between the parties, it was certainly not less than *prima facie* against the mortgagee in respect of them."

He further said:

"The mortgagee was not, and could not have been, made a party to that action at law; nor is this intervention a proceeding against the mortgagee to recover over *in personam*. To what extent third parties may go in impeaching judgments collaterally need not be discussed. There is no pretense here of want of jurisdiction, or of fraud, collusion, or gross neglect in obtaining the judgment, or of any irregularity invalidating it. The only way in which the judgment was questioned was by exceptions to the master's report, which raised objections to its admission in evidence, to its sufficiency as proof of the allegations of the petition, to the award of priority, and that the master erred in not reporting that Bouknight, on the face of his petition, was guilty of contributory negligence, and not entitled to recover. The date of the mortgage appearing, the judgment record was sufficient to make out petitioner's case, if admissible in evidence; and we are clear that it was admissible under the statute, not simply as establishing the fact of its rendition, but as proof of when the action was brought, what for, and the amount. Being conclusive as to each of these matters as between the parties, it was certainly not less than *prima facie* against the mortgagee in respect of them, and that is enough to dispose of the inquiry here."

"In *Hassall vs. Wilcox*, 130 U. S., 493, 9 Sup. Ct., 590, the judgment in controversy was rendered on a complaint, counting on a note, the consideration of which appeared on its face to be in part for services which were not, and in part for labor claims which were, entitled to preference under the statute of Texas involved in the case; and, this being so, it was held by the Supreme Court that the bondholders had the right to compel the plaintiff to prove affirmatively the amount for which he was entitled to a lien. The case is peculiar and does not rule the point before us." (Page 448.)

In *Central Trust Company vs. Railroad Co.*, 65 Fed., 257, Judge Simonton held that a judgment was valid as against a mortgagee not a party thereto on the ground that the statute authorizing the judgment was in force when the mortgage was made and the rights secured to the judgment creditor entered into and became a part of the contract, and that such

judgment was conclusive as against the mortgagee if the court had jurisdiction, and in the absence of fraud or collusion. In speaking of the case of *Hassall vs. Wilcox*, referring to the record of the mechanic's lien judgment, he said:

> "The judgment was attacked because obtained by fraud and collusion upon a note without consideration, and in a suit brought after the time permitted in the statute. In the case at bar the purchasers, exercising the right of trustees of the mortgage, have come into this court, and have challenged the lien of the judgment, and, in reply to the challenge, have had exhibited to them a judgment against the common debtor for personal injuries, obtained in a suit brought within 12 months after cause of action arose, without shadow of fraud or collusion. The conditions of the South Carolina statute are thus fulfilled."

The same rule prevents a subsequent mortgage lien-holder from attacking a prior judgment lien which is good as against the owner of property.

In *Sioux City Terminal R. & W. Co. vs. Trust Company*, (Cir. Ct. App., 8th Cir.), 82 Fed., 124, it was held that subsequent lienholders stand in the shoes of the mortgagor, where the prior lien has not been obtained and accepted with the intent to defraud them, and that if the owner or mortgagor was precluded from attacking the prior lien, as contrary to the statute, the subsequent lienholders could not.

> "They have no legal lien upon the mortgaged property prior to that of the mortgage, and the same considerations which have defeated the defense of the mortgagor make this mortgage impregnable to the assaults of these creditors."
> (Pp. 136-7.)

In *Newark City National Bank vs. Crane* (N. J.), 45 At. Rep., 975, the binding effect of a judgment as against strangers thereto is thus stated:

> "There is a clear distinction between a decree and the law declared by the court which produces the decree, and though a party may not be bound by a decree, as such, he may be bound, so to speak, by the law which produces that decree. This is to say, his rights are affected, as all other citizens' rights are affected, by the declaration of the law made by the courts in the due administration of justice."
> (Page 976.)

But upon whatever grounds a judgment may be collaterally attacked by a stranger thereto, the right to such attack

cannot be greater than that possessed by the judgment debtor. The defendant has the right to raise the question of the want of jurisdiction over him or the subject matter of the suit, has the power to prevent a judgment being rendered against him by fraud or collusion, has the opportunity to set up a want of consideration for the claim sued upon or any other defense tending to show the illegality or invalidity of the claim sought to be enforced, and in case the judgment go against him, has the right by appeal, writ of error or other direct proceeding to reverse or modify the judgment adverely affecting his interest. But a stranger to such suit has not the same right and is not given the same opportunity to defend or appeal. Consequently he is permitted to attack the judgment upon certain grounds when it is sought to be enforced against him. He is, however, in all cases limited to the defenses which might have been interposed and the rights which might have been asserted by the defendant in the suit under whose rights he claims. He cannot assert any different or greater defenses or rights than the judgment debtor could have asserted at the time of the rendition of the judgment. He cannot attack collaterally when the defendant could not have attacked directly in the suit or by appeal. In other words, as applied to the case at bar, the defendant in error cannot attack the mechanic's lien judgment upon any ground which the Oconto Water Company urged as a defense to the suit and urged as a ground of reversal of the judgment in the Appellate Court. The extent, character and validity of the mechanic's lien were disputed by the defendant Oconto Water Company and the defense was interposed that under the statutes of Wisconsin and by the public policy of the state the plaintiff in error had and could have no lien against the water plant. Those questions having been raised by the defendant and determined adversely against it in the mechanic's lien foreclosure suit, the defendant in error, deriving its right and title from the Oconto Water Company, cannot raise again in a collateral proceeding the same question. It, as all other citizens, is bound by "the law declared by the court which produces the decree," not because it is a party or privy therein or thereto, but because the court having jurisdiction of the *res* and of the party from whom all the rights of the contestants are derived, has upon full hearing, without fraud or collusion,

declared the law of the case which is binding upon all parties everywhere and in all other proceedings.

See Swiggert vs. Harber, 4 Scam. (Ill.), 364; 39 Am. Dec., 418.

Voorhees vs. Bank of the United States, 10 Pet., 474.

Crescent City Live Stock Co. vs. Butchers' Union, supra.

V.

Andrews and Whitcomb as stockholders were bound by the decree against the Oconto Water Company to the extent that they could not dispute the validity of it nor say that the Statutes of Wisconsin did not give a lien to the plaintiff in error as therein adjudged.

At the time of the commencement of the mechanic's lien foreclosure suit and at the time of the decree therein, Andrews and Whitcomb each held one share of stock in the Oconto Water Company, which they obtained by assignment from the original subscribers of such stock, and Andrews was the secretary and treasurer of the company. (Record pp. 86, 88, 92.) On the 29th day of September, 1891, and at all times thereafter down to and including the date of the mechanic's lien decree, Andrews and Whitcomb were the absolute owners and holders of the entire capital stock of the Oconto Water Company, and prior thereto had held such stock in their own name, but as collateral security. (Record pp. 97, 125, 126.)

The Court of Appeals decided that their relations to the Oconto Water Company were such that they were *not liable to the creditors* thereof as stockholders, and that they were not such privies to the decree in the mechanic's lien foreclosure as would bind them in their relations as *mortgage creditors* of such company. The question was not decided as to whether they occupied such relation to the Oconto Water Company as stockholders and officers and in control of the affairs of that company as would make them privies to the decree and thereby bound to the same extent as the Oconto Water Company was bound thereby. In other words it was decided that their rights as mortgage creditors would not be cut off or destroyed by such decree, but it was not decided that they, as stockholders, would not be bound to the same extent as the corporation

by the decree rendered establishing the mechanic's lien. This question is therefore open for decision here. If the Oconto Water Company would be estopped to deny that the statutes of Wisconsin did not give to the plaintiff in error a mechanic's lien on the 15th day of September, 1890, on the water plant for the materials furnished for and used in its construction, then they, as stockholders, would likewise be estopped, and cannot be heard in that suit or in this, to question the date, validity or effect of the mechanic's lien statutes by virtue of which the decree was made and the lien enforced.

> "A stockholder is so far an integral part of the corporation that in view of the law, he is privy to the proceedings touching the body of which he is a member."
>
> *Hawkins vs. Glen*, 131 U. S., 319, 329.

> "We do not mean that it is *conclusive* as against any individual sued as a stockholder that he is one, or if one, that he has not already discharged, by payment to some other creditor of the corporation, the full measure of his liability or that he has not *claims against the corporation*, or judgments against it, which he may, in law or equity, as any debtor, whether by judgment or otherwise, set off against the claim or judgment, *but in other respects it is an adjudication binding him.* He is so far a part of the corporation that he is represented by it in the action against it."
>
> *Hancock Nat'l Bank vs. Farnum*, 176 U. S., 640, 643.

The defendant in error, succeeding to the rights of Andrews and Whitcomb, cannot claim, as the court below held, that "under the laws of Wisconsin the plaintiff has no lien. The only claim of lien is under a statute of Wisconsin, which gives no lien," and that "the plaintiff never had any lien. Such is the settled law of this state, and the judgment in the case in the federal court is proof conclusive on the question."

A mechanic's lien decree "when rendered is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense, either by plea or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between

themselves, and may be carried into execution in due course of law to its full extent."

Crescent Live Stock Co. vs. Butchers' Union, 120 U. S., 141, 157-158.

The doctrine that a stockholder is privy to a decree against a corporation and cannot set up or claim any defense to the action which was available to the corporation, except in case of fraud or collusion, and especially cannot set up collaterally or in another action the same defense that was set up and urged by the corporation in the suit in which the decree was entered, is held and illustrated in the following cases:

Bissit vs. Kentucky Co., 15 Fed. 353 and note.

Chicago Bridge Co. vs. Anglo-American P. Co., 46 Fed. 584.

Hendrickson vs. Bradley, Circuit Court of Appeals, 8th Circuit, 85 Fed. 508.

Wilson vs. Seymour, 76 Fed., 678.

James vs. Central Trust Co., Cir. Ct. of App., 4th Circuit, 98 Fed., 489.

Stutz vs. Handley, 41 Fed., 531.

Singer vs. Hutchinson, 183 Ill., 606.

VI.

The commencement of the action to foreclose the mechanic's lien, being an action in rem, gave the Court exclusive jurisdiction of the subject matter of the suit, and the decree therein was binding, not only on the Oconto Water Company, made defendant therein, but upon all parties, including the defendant in error, and the state Court had no jurisdiction of the same subject matter, and its judgment and the sale under it were void.

The question involved is one of title and right of possession.

No objection was raised to this action brought in equity for possession of the property and to enjoin the defendant from holding or using the same and to grant the title of the plaintiff, on the ground that the plaintiff had an adequate remedy at law. Such objection was waived.

The rule in Wisconsin is that such an objection is waived unless taken specifically by demurrer or answer.

Hoff vs. Olson, 101 Wis., 118.

The state Court recognized the action as a proper one under the laws of Wisconsin for the relief sought.

Scranton vs. Wheeler, 21 Sup. Ct. Rep., 48-52.

The court below therefore had the right to treat the action as involving, among others, the question of title and right of possession, one usually involved in an action of ejectment. In a suit of ejectment or by creditor's bill or in any other suit involving a contest between adverse claims of title the rights of the parties are to be determined as of the date of their respective liens. Th title obtained by the purchaser at the sale in foreclosure proceedings relates back to the date of the commencement of the lien foreclosed and not merely to the date of the judgment rendered or the date of the sale. The priority of the legal title is with the holder of the prior lien.

Whitney vs. Higgins, 10 Cal., 547.

See *Finch vs. Newnham*, 2 Vernon, 216.

Has the plaintiff in error a prior title and entitled to possession as against the claim of title and possession of the defendant in error?

The defendant in error obtained no *title* to the property.

The mechanic's lien foreclosure suit was in equity. Sec. 3323, R. S. Wis., relating to proceedings to foreclose mechanic's liens provides that:

> "Such actions shall be deemed equitable and any issue of fact therein may be referred by the court as in other cases."

The action being one in equity, "the remedies to be applied are not those provided under state statutes, but are such as obtain in this jurisdiction. It is well settled that state statutes cannot add to or take from the jurisdiction of the United States courts."

De La Vergne R. Co. vs. Brewing Co., 46 Fed., 829-30.

> "The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the union."

Payne vs. Hook, 7 Wall., 430.

Although the lien is given by statute, its enforcement may be in the United States court in equity, and such court, having jurisdiction of the subject matter, can give whatever relief it may find just or proper to the complainant, even if it exceed or be much more comprehensive than that specified in the statute, or that which might have been given had the action been commenced in the state court.

In *Sheffield Furnace Co. vs. Witheroe*, 149 U. S., 574, it was held that although the statute limited the mechanic's lien to one acre to be selected by the party entitled to the lien, yet that the court in equity might extend such statutory lien to twenty acres, if the defendant had by stipulation extended the lien over an additional amount of property. The court say:

> "The defendant contends that by the state law the lien was limited to one acre of ground. The plaintiff claims that by virtue of his contract and filing of his statement of lien, he was entitled to a decree subjecting a tract of twenty acres to the satisfaction of his debt. He therefore claims rights of an equitable nature arising from something more than the statute, and based partly upon his contract. Certainly such a claim as that is one of an equitable nature and to be adjudicated only in a court of equity." (Page 580.)

If the court had *power* to grant such extension, it had the *power* to declare a lien where none existed by statute. "The lien judgment is not *void*, because it gave the plaintiff a specific lien on more than one acre of land in an incorporated village." (*McCoy vs. Quick*, 30 Wis., 521-6.) It was valid to the whole extent thereof until duly reversed or modified. *Idem.*

Justice Field in *Davis vs. Alvord*, 94 U. S., 545-6, in speaking of the foreclosure of a mechanic's lien, said:

> "It is essentially a suit in equity, requiring specific directions for the sale of the property such as are usually given upon the foreclosure of mortgages and sale of mortgaged premises."
>
> *See Idaho & O. L. Imp. Co. vs. Bradbury*, 132 U. S., 509.

In such action all persons holding liens on the premises, whether by mortgage, judgment or otherwise, could have been made parties, or might upon application have become parties thereto, and be entitled to payment out of the proceeds of the sale.

Sections 3321, 3324, R. S. Wis., are as follows:

"Section 3321.—Any person having so filed such claim for a lien may foreclose the same by action in the Circuit Court or any County Court having jurisdiction thereof. All persons having filed such claims for liens for work done or materials furnished in the cases mentioned in sections 3314 and 3315, may join as plaintiffs; and if any do not so join or refuse to so join they may be made parties defendant. All persons having liens upon the premises by mortgage, judgment or otherwise, subsequent to the lien sought to be foreclosed, and all purchasers of the premises subsequent to such lien may be joined as parties defendant. In case any person who has filed such claim for lien prior to the commencement of such action, or who has such subsequent lien, or who is such subsequent purchaser, is not made a party to such action he may, upon application at any time before judgment, be made a party defendant thereto, and any person who shall file such claim for lien after the commencement of such action or who shall obtain such subsequent lien by mortgage, judgment or otherwise, or become such subsequent purchaser after the filing of the notice of the pendency of such action, may, at any time before judgment, upon application, be made a party defendant thereto. If such action be brought by a subcontractor the principal contractor may also be made a party defendant thereto. When the place of trial is changed all subsequent proceedings, including the bringing in of new parties, shall be had in the county to which such change is made."

"Section 3324.—The judgment in such action shall adjudge the amount due to the plaintiff, or in case several claims for liens are embraced in the action the amount due to each claimant who is a party to the action. It shall direct that the interest of the owner in the premises at the time of the commencement of the work or furnishing the materials for which liens are given, or which he or any person claiming under him has since acquired, or so much thereof as may be necessary, be sold to satisfy the amount of the lien of the plaintiff or of the several liens embraced in the action, with the costs of such action, including the cost of filing the claims for liens; and that after satisfying the same, together with such costs, the residue of the proceeds be brought into court with the report of sale to abide the order of the court."

The deed given upon the sale under the decree, after confirmation, was effectual to pass to the purchaser all the interest in the premises directed to be sold, and the purchaser after such confirmation of the sale, was entitled to a writ of assistance to obtain possession as against the defendant in the suit, and all persons who may have come into possession of the premises after its commencement.

"Section 3326, Wis.—All sales under such judgments may be made by the sheriff or a referee appointed by the Court for that purpose, who shall give notice thereof in the manner provided by law for the sale of real estate upon execution, unless the Court shall order other or different notice to be given, and shall be absolute and without redemption; and the deed given thereon, in case such sale is confirmed, shall be effectual to pass to the purchaser all the interest in the premises directed to be sold. Such sheriff or referee shall within ten days after making such sale, file with the clerk of the court in which the judgment is rendered a report of the sale for confirmation thereof, and shall, immediately after the sale, pay to the parties entitled thereto the amounts adjudged to them respectively, after deducting the costs thereof, unless otherwise ordered by the court. If any deficiency arise upon such sale in the payment of the sums adjudged to be due to any such claimant of a lien given by this chapter the sheriff or referee shall specify the amount of such deficiency in his report, and if demanded in the complaint or in the answer of any such lien claimant the court, upon confirming such sale, may render judgment therefor against the defendant legally liable to pay the same, which judgment may be docketed and enforced in the same manner that ordinary judgments are. And the purchaser or purchasers at such sale shall be entitled to a writ of assistance to obtain possession of the premises sold in the same manner as is provided in section 3025.

"Section 3025, Wis.—Whenever a title shall have become perfected in any person to any real estate sold by virtue of an execution, or to any part thereof or interest therein, and the person against whom such execution issued or any other person claiming under him by title accruing subsequently to the docketing of the judgment upon which it issued shall be in possession of any such real estate or part thereof or interest therein, and upon demand of the person, his agent or attorney, in whom such title shall have been perfected, shall refuse to surrender the possession thereof to him he may apply to the court from which the execution issued or the presiding judge thereof, by petition, duly verified, setting forth the facts, for a writ of assistance to remove such person from the possession of such real estate and to deliver the possession thereof to him. A copy of such petition, with a notice of the time and place when and where the same will be presented, must be served upon the person against whom the writ is prayed for at least ten days before the same is presented; such petition may be served as a summons in an action in the Circuit Court. The court or such judge may direct such writ to issue, and the same shall be executed and return made in like manner as upon a sale made upon a judgment for foreclosure of a mortgage."

Section 3169, Wis.—Upon any such sale being made the sheriff or referee making the same, on compliance with its terms, shall make, execute and deliver to the purchaser a deed of the premises sold, setting forth each parcel of land sold to him and the sum paid therefor, which deed, upon the confirmation of such sale, shall vest in the purchaser all the right, title and interest of the mortgagor, his heirs, personal representatives and assigns, in and to the premises sold and shall be a bar to all claim, right or equity of redemption therein, of and against the parties to such action, their heirs and personal representatives, and also against all persons claiming under them subsequent to the filing of the notice of the pendency of the action in which such judgment was rendered; and the purchaser, his heirs and assigns, shall be let into the possesion of the premises so sold on production of such deed or a duly certified copy thereof, and the Court may, if necessary, issue a writ of assistance to deliver such possession."

See rules 9 and 10, rules of Practice and Equity, U. S. Court.

Terrell vs. Allison, 21 Wall., 289-91-3.

Root vs. Woolworth, 150 U. S., 401-12-13.

Gelpcke vs. R. R., 11 Wis., 454-8.

F. L. & T. Co. vs. Ry. Co., 44 Fed., 653.

Lewis vs. Hamilton, 58 Pac. (Col.), 140.

The court had jurisdiction to determine the priority and validity of all liens, whether prior or subsequent, and to make all holders thereof parties defendant, and to sell the land free of all encumbrances.

Hefner vs. Ins. Co., 123 U. S., 747-54.

The mechanic's lien decree not only established and enforced the lien as of the 15th day of September, 1890, against the real estate and water plant of the company, but provided that upon a sale of the same by the marshal there should be sold with it "the franchise of maintaining and operating the said plant for the uses to which it is devoted by the law of its incorporation, as an entirety." (Record, p. 19.)

It was contended upon the hearing of that case that the statutes of Wisconsin gave no lien upon the franchises of a corporation, and that therefore a court of equity could not decree one nor could it decree a sale of such franchises, either as a part of or separate from the real estate against which the lien might be enforced. With respect to the contention as

to whether the court could decree a sale of the franchise as well as of the corporeal property, the Court of Appeals adopting the opinion of the court below, said:

> "I think it within the inherent powers of a court of equity to so decree, not that the lien embraces the franchise, but because plant and franchise have by the act of the defendant been rendered inseparable. The plant has been applied to a public use. The public welfare requires that use to be uninterrupted. A court of equity may therefore well require that the right to the use shall follow the tangible property devoted to that use and dependent upon it. * * * The course suggested is conformable to equity. * * * It is demanded by the exigency of the occasion that equity should supplement and effectuate the law."
>
> *Oconto Water Co. vs. National Pipe Works*, 18 U. S. App., 380-403-4.

It has been further held that the transfer of tangible property will in equity carry the franchise of operating it when the separation of the two would injure or destroy them.

Andrews vs. Pipe Co., 46 U. S. App., 619-21-2.

It does not take from the jurisdiction of the federal court exercising its inherent equitable powers, that the state court would not have granted the same or as extensive relief had the action been commenced and determined in that court. Indeed, we know that the state court would not have granted such extensive relief, inasmuch as in *Chapman Valve Mfg. Co. vs. Oconto Water Co.*, 89 Wis., 264, it was said that the mechanic's lien statute "gives no lien upon or right to sell the franchise to operate the works. Whether the statute shall be extended by construction to cases not within its express terms may depend somewhat on its subject matter as related to questions of public policy and convenience. The effects and consequences which may result from an enlarged construction of the statute may be considered in determining its proper construction. * * * Nor has a court of equity power to extend the lien over rights not made subject to it by the statute." (Pp. 273-4.)

Whatever limitations, therefore, may be made in the state Court in a mechanic's lien foreclosure suit do not affect or limit the remedies which a federal Court in equity may prescribe and enforce, and we are here concerned only with the

decree of a federal court sitting in equity, having jurisdiction of the parties and the subject matter of the suit, and the rights and title obtained by the purchaser at a sale under and pursuant to such decree, duly confirmed by the court.

Crescent C. L. S. Co. vs. B. Union Co., supra.

Under a decree in equity for the sale of property, the court virtually has possession of the estate for the purposes of sale, delivery of possession and distribution of the proceeds of sale. The court so in possession of the property becomes its vendor. The marshal or other officer making the sale in equity is but the hand of the court. *The court itself makes the sale and delivers the possession.*

Rorer on Judicial Sales, Sec. 1.
Williams' Case, 3 Bland, 215.
Warfield vs. Dorsey, 39 Md., 299.
Deck vs. Whitman, 96 Fed., 873.

It is on this theory that the rule is established that the title of the purchaser at a sale under a decree in equity does not vest until after confirmation of the sale by the court in which the decree was rendered.

Allen vs. Elderkin, 62 Wis., 627.
Meehan vs. Blodgett, 91 Wis., 63.
Miller vs. Sherry, 2 Wal., 237.

In a suit to foreclose a mechanic's lien, as in a suit to foreclose a mortgage or any similar proceeding affecting the title and possession of real estate, a receiver may be appointed *pendente lite* and the allegations of the bill may, if necessary, at any time be amended to cover such remedy.

Webb vs. Van Zandt, 16 Abb. Pr., 314.
Shields vs. Coleman, 157 U. S., 168-78.
Gaylord vs. R. R. Co., 6 Bis., 286.

It is clear, therefore, that the federal court in the mechanic's lien foreclosure suit, having jurisdiction of the parties and the subject-matter, was authorized not only to try the issues raised by the pleadings, but also to render a decree, to make sale of the premises and to take such proceedings by the appointment of a receiver or by issuing a writ of assistance as might be necessary to deliver the *res* to the purchaser

at the foreclosure sale or to such person as should be entitled thereto. Such jurisdiction having attached on the filing of the bill, the court would retain the same until the judgment was satisfied.

"The *jurisdiction of a court is not exhausted by the* rendition of the judgment, but continues until the judgment shall be satisfied." "Process subsequent to judgment is as essential to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the constitution." "The two sets of tribunals—state and national—are as independent as they are separate. Neither can impede or arrest any action the other may take within the limits of its jurisdiction for the satisfaction of its judgment and decrees." "To deprive a court of the power to execute its decrees is to essentially impair its jurisdiction."

Central National Bank vs. Stevens, 169 U. S., 432-64-5.
See Terrell vs. Allison, 21 Wall., 289-91.
Root vs. Woolworth, 150 U. S., 401-12-13.

An action to foreclose a mechanic's lien is, as an action to foreclose a real estate or chattel mortgage, substantially an action *in rem,* and although sometimes spoken of as an action *quasi in rem,* its institution, so far as exclusive jurisdiction of the *res* is concerned, is exactly the same as an action strictly *in rem,* binding all parties as to the court in which their remedies must be sought.

Heidritter vs. Elizabeth Oil Cloth Co., 112 U. S., 294.
See Day vs. Micou, 18 Wal., 156-162.

An action to foreclose a mortgage, whether of real estate or of personal property, is "a proceeding *in rem,* as much so as an attachment suit against the property of an absent debtor or a suit instituted to partition real estate. And the property is within the power of the court until the judgment or decree is entered, so that the lien upon it may be enforced as the statute requires."

Broom vs. Armstrong, 137 U. S., 266-278.

"It is true that, in a strict sense, a proceeding *in rem* is only taken directly against property and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense the terms are applied to actions between parties

where the direct object is to reach and dispose of property owned by them or of some interest therein. Such are cases commenced by attachment against the property of debtors or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state they are substantially proceedings *in rem*, in the broader sense which we have mentioned."

Pennoyer vs. Neff, 95 U. S., 714-34.

Jurisdiction of the court has reference to (1) the power of the court over the parties; (2) over the subject-matter; (3) over the *res* or property in contest.

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought."

"Jurisdiction of the person is obtained by the service of process or by the voluntary appearance of the party."

"Jurisdiction of the *res* is obtained by seizure under process of the court, whereby it is held to abide such order as the Court may take concerning it." (Page 317.)

Cooper vs. Reynolds, 10 Wall., 308-16-17.

See Voorhees vs. Bank, 10 Pet., 449.

The case of *Cooper vs. Reynolds*, supra, is cited in *Roller vs. Holly*, 176 U. S., 398, at page 405, where Justice Brown says:

"In suits for the foreclosure of a mortgage or other lien upon such property (real estate) no preliminary seizure is necessary to give the court jurisdiction. The cases in which it has been held that a seizure or its equivalent, an attachment or execution upon the property, is necessary to give jurisdiction are those where a general creditor seeks to establish and foreclose a lien thereby acquired. Of this class, *Cooper vs. Reynolds*, 10 Wall., 308, 19 L., ed. 931, is the most prominent example. * * * The object of such attachment is merely to give a lien upon the property which the courts may enforce. And if a lien already exists, whether by mortgage, statute or contract, the court may proceed to enforce the same precisely as though the property had been seized upon attachment or execution."

A federal court first taking jurisdiction of the subject-matter of a suit and appointing a receiver therein, or in any other matter taking *actual* custody of the property, has exclusive jurisdiction thereof, and a state court cannot thereafter at the suit of another creditor acquire or exercise jurisdiction of the same subject-matter. The court first taking jurisdic-

tion of the *res* withdraws the same from the judicial power of all others, and any proceedings commenced in another court affecting in anywise the same subject-matter are absolutely "nugatory and void" and pass no *title* whatever to the property.

Wiswall vs. Sampson, 14 How., 52.
Railroad Company vs. Railroad Company, 20 Wis., 165.
In re Schloerb, 97 Fed., 326.
White vs. Schloerb, 178 U. S., 542.
Pittsburgh Ry. Co. vs. L. & T. Co., 172 U. S., 493-513.
M. T. Co. vs. Ry. Co., 100 Fed., 897.

The federal courts are independent of the state courts:

"They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judical power of the other, as if it had been actually *carried physically into a different territorial sovereignty.*"

Covell vs. Heyman, 111 U. S., 176.
Heidritter vs. El. Oil Cloth Co., 112 U. S., 294.

So rigidly is this rule enforced that even where the marshal takes property into his possession under color of a writ of attachment, which writ is invalid, the court takes *exclusive* jurisdiction of the subject-matter, and all other creditors having any lien upon or right to the same must go into the federal court for relief, and no other court can acquire any jurisdiction over the property so illegally held under such writ.

Gumbel vs. Pitkin, 124 U. S., 131.

So it has been held that where a marshal, upon a writ of attachment upon mesne process, takes the property of a person not named in the writ, the property is *in custodia legis* and the original owner cannot maintain an action of replevin against the marshal, nor recover the property in any way except *in the court from which the writ issued.*

Lammon vs. Feusier, 111 U. S., 17.
In re Tyler, 149 U. S., 164.

The doctrine in *Wiswall vs. Sampson* applies with like effect whether or not an *actual* seizure of the *res* has been made under judicial process or *actual custody* taken by the

appointment of a receiver. Constructive possession is sufficient, the mere bringing of a suit *in rem* is equivalent to a seizure of the property. An ordinary proceeding upon bill filed to foreclose a mortgage in a case where no receiver is appointed and no service of process has been made and no actual custody of the property has been taken gives exclusive possession of the *res*.

Farmers Loan & Trust Company vs. Lake St. Elev. R. R. Co. et al, 177 U. S., 51.

The doctrine is there stated as follows:

"As then, the bill of foreclosure had been filed in the circuit court of the United States, and the jurisdiction of that court had thus attached before the commencement of the suit in the state court, it follows upon principle and authority that it was not competent for the state court to interfere by injunction *or otherwise* with the proceedings in the federal court.

The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.

Nor is this rule restricted in its application to cases were property has been actually seized under judical process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of litigation, the court *may* be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to federal and state courts. *Peck vs. Jenness*, 7 How., 612, 12 L. ed., 841; *Freeman vs. Howe*, 24 How., 450, 16 L. ed., 749; *Moran vs. Sturges*, 154 U. S., 256, 38 L. ed., 981; *Central Nat. Bank vs. Stevens*, 169 U. S., 432, 42 L. ed., 807; 18 Sup. Ct. Rep., 403; *Harkrader vs. Wadley*, 172 U. S., 148, 43 L. ed., 399, 19 Sup. Ct. Rep., 119.

We think that this salutary rule is applicable to the present case. The bill filed in the federal court looked to the enforcement of the trusts declared in the mortgage, the control of the railroad through a receiver, the sale of the railroad, and the final distribution of the assets of the company. Such a proceeding necessarily involves the right of the complainant trustee to act as such, and the determina-

tion of the controversy in respect to the ownership of the bonds and to the power of a majority of the bondholders, by an agreement with the stockholders, to dispense with an enforcement of the provisions of the mortgage by judicial proceedings. These questions are not for our consideration, unless and until they are brought before us on appeal from a final decree of the court whose jurisdiction was first legally invoked to determine them."

That this doctrine applies not only to proceedings in equity to foreclose a mortgage, but to all proceedings to enforce or establish liens or looking towards the control, sale or other disposition and delivery of possession by writ of possession or otherwise of the *res* sought to be affected by the suit, see the following authorities:

Lammon vs. Feusier, 111 U. S., 17.
Heidritter vs. Elizabeth Oilcloth Co., 112 U. S., 294.
Tua vs. Carriere, 117 U. S., 201.
Geilinger vs. Phillipi, 133 U. S., 246.
Rio Grande R. R. Co. vs. Gomila, 132 U. S., 478.
Leadville Coal Co. vs. McCreery, 141 U. S., 475.
Shields vs. Coleman, 157 U. S., 168.
Gaylord vs. Railroad, 6 Biss., 286.
Union Trust Co. vs. Railroad, 6 Biss., 197.
Union Ins. Co. vs. University, 10 Biss., 191.
Riggs vs. Johnson County, 6 Wall., 166.
Cohen vs. Solomon, 66 Fed., 411.
In re Schloerb, 97 Fed., 326.
Appleton W. Co. vs. Trust Co. (Cir. Ct. App., 7th Cir.), 93 Fed., 286.
Adams vs. Mercantile Co. (Cir. Ct. App., 5th Cir.), 66 Fed., 617.
Holland Trust Co. vs. Tramway Co. (Cir. Ct. App., 5th Cir.), 85 Fed., 865.
Leathe vs. Thomas (Cir. Ct. App., 7th Cir.), 97 Fed., 136.
Hubinger vs. Trust Co. (Cir. Ct. App., 8th Cir.), 94 Id., 788-790.
Deck vs. Whitman, 96 Fed., 873.
Iron Mt. R. Co. vs. Memphis (Cir. Ct. App., 6th Cir.), 96 Fed., 113.
Colston vs. S. H. B. & L. Ass., 99 Fed., 305.
M. Trust Co. vs. Ry. Co., 100 Fed., 897.

Riesner vs. Ry. Co. (Texas), 36 S. W. R., 53.
Bragg vs. Gaynor, 85 Wis., 468.
Winner vs. Hoyt, 68 Wis., 278.
N. W. Iron Co. vs. Improvement Co., 92 Wis., 487.
Smith vs. Zimmerman, 85 Wis., 542-5.

It was erroneously assumed in the decision of the case of *Andrews and Whitcomb vs. National Foundry & Pipe Works, Limited*, 46 U. S. App., 294, in the Court of Appeals that the proceedings begun by Andrews and Whitcomb to foreclose their mortgage were *"in the same court"* as the foreclosure proceedings previously begun by the plaintiff in error to foreclose its mechanic's lien. The question was not discussed or decided as to what effect should be given to the mechanic's lien decree or as to what effect the foreclosure proceedings of Andrews and Whitcomb had upon the foreclosure proceedings of the plaintiff in error in the light of the fact that the federal court first took exclusive jurisdiction of the subject-matter of both suits and the later suit was begun in the state court.

It was clearly error, therefore, in the state court to hold that the proceedings in the state court to foreclose the Andrews and Whitcomb mortgages *did not conflict in the slightest degree* with the jurisdiction of the federal court to enforce against the Oconto Water Co. the mechanic's lien.

VII.

The defendant in error acquired only a contract right, if any at all, and not a title to the water plant.

The court below held that the mortgage and sale of the ordinance rights given by the city of Oconto to Andrews and Whitcomb embraced all subsequently acquired real and personal estate and the whole water works plant. (Record p. 31.)

This was doubtless founded upon a dictum in the case of *Chapman Valve Mfg. Co. vs. Oconto Water Co.*, 89 Wis., 264-73, "that the franchise is the principal thing" and the tangible property of the plant follows a sale of the franchise as an incident thereto. But in the final opinion of the federal court of appeals it was held that the transfer of the tangible property would in equity carry the franchise of operating it.

(*Andrews vs. Pipe Co.*, 46 U. S., App., 619-21-2.) If, therefore, the lien of the plaintiff in error was prior to that of the mortgages, the sale under the mechanic's lien decree operated to transfer both the plant and its franchise to the plaintiff in error and the sale of the city ordinance under a subsequent lien could not embrace the water plant itself.

Furthermore, since the decision of the Chapman Valve case the Supreme Court of Wisconsin has held that the ordinance granted to the Oconto Water Company referred to in such case was not a corporate franchise, but was in effect a *mere contract* between the company and the city and that the City of Oconto under its charter had no authority to grant a corporate franchise to this company to erect a water plant.

Oconto City Water Supply Co. vs. City of Oconto, 105 Wis., 76.

See *Linden Land Co. vs. Elec. Ry. Co.* (Wis.), 83 N. W., 851.

State vs. Portage City Water Co. (Wis.), 83 N. W., 697.

VIII.

Andrews and Whitcomb were privies to the mechanic's lien foreclosure suit so far as their rights under their second mortgage was concerned.

The mechanic's lien foreclosure suit having been commenced on the 30th day of January, 1891, Andrews and Whitcomb took their contract or mortgage dated March 13, 1891, subject to that pending litigation and to the rights of the purchaser under the decree therein. The defendant in error can claim no right or title to the property based upon the title acquired by Andrews and Whitcomb at the sale under the judgment foreclosing such contract or mortgage.

"All persons dealing with property are bound to take notice of a suit pending with regard to the title thereto and will on their peril purchase the same from any of the parties to the suit."

Union Trust Co. vs. Southern Nav. Co., 130 U. S., 565-70.

"It is deemed that every person is bound to know the law, and to take notice of what is transpiring in the courts,

from the time when the process is served and the complaint filed until the final judgment is entered. The purchaser *pendente lite* is deemed to be represented in the litigation by his vendor, and the purchaser is just as much bound by the final judgment rendered as is the party whose right he purchases."

Brown vs. Cohen, 95 Wis., 90-3.

"The object of *lis pendens* is not, primarily, notice, but to hold the subject of the suit, the *res,* within the power of the court, so as to enable it to pronounce judgment upon it."

Brown vs. Cohen, supra.

"By the institution of a suit the subject of litigation is placed beyond the power of the parties to it; for whilst the suit continues in court, it holds the property to respond to the final judgment or decree."

Stoddard vs. Myers, 8 Ohio, 203-9.

IX.

The mechanic's lien was given by statute and accrued when the construction of the plant was commenced, and has never been cut off by the mortgagees.

The plaintiff in error having obtained its lien upon the property of the Oconto Water Company by furnishing materials, filing its notice as provided by the statute, and having commenced proceedings to enforce such lien prior to the suit by Andrews and Whitcomb to foreclose their mortgage, they were bound to take notice of such lien and to make it a party to such suit to cut off its lien if claimed by them to be subsequent to their mortgages, or else abide the result of the suit to foreclose the mechanic's lien.

Wiltsie on Mortgage Foreclosure, §62-3.

The plaintiff in error was an encumbrancer and lienholder and therefore a necessary party to the mortgage foreclosure proceedings in order to be affected thereby and to be foreclosed of its lien.

In *Redmon vs. Phoenix Ins. Co.,* 51 Wis., 292, the question arose as to whether a mechanic's lien was an "incumbrance" within the meaning of an answer to a question upon an application for a policy of insurance. It appeared in that

case that certain parties had furnished machinery for a mill erected upon property, and that they had filed a mechanic's lien in the county in which the property was situated. No action had been commenced to foreclose the lien and of course no decree had been entered establishing the lien. The court say:

"We therefore hold that a subsisting mechanic's lien, for which a petition was filed, is an incumbrance within the ordinary meaning of the word."

In *Davis vs. Bilsland*, 18 Wall., 659, it was held under a mechanic's lien statute of Montana similar to the statutes of Wisconsin that "the liens secured to the mechanics and material men have precedence over all other incumbrances put upon the property after the commencement of the building."

In *Brooks vs. Railway Company*, 101 U. S., 443, it is said:

> "Whoever takes a mortgage upon a building in process of erection, should assume that the mechanic's work is to go forward, and he may form some estimate of the amount that will be required." (Page 452.)
>
> "The statute which the courts construed as giving a permanent lien under such circumstances, was in existence when the mortgage of the appellants (defendants) was made. It entered into and became a part of their contract. They knew that the road (plant) was yet to be built, and that while such building would add to the value of their security, the law gave to the men whose labor and money built it a lien superior to that of the mortgage." (P. 451.)

In *Van Stone vs. Mfg. Co.*, 142 U. S., 128-36, it is said:

> "It is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material man and laborer his lien under the statute."

On page 137 the court speaks of the decree rendered in a mechanic's lien foreclosure action as "the action of a court in entering up a *judgment recognizing and enforcing such lien.*"

See Goodman vs. Baerlocher, 88 Wis., 287-292-3.

In re Kirby-Denis Co. (Ct. Ap., 7th Cir.), 95 Fed., 116.

In *Vilas vs. McDonough Mfg. Co.*, 91 Wis., 607, the Court was called upon to determine whether a mechanic's lien prior to the rendition of the decree foreclosing the same was or was not paramount to a mortgage. Under section 3314, R. S.

Wis., which provides that the mechanic's lien "shall be *prior* to any other lien which *originates subsequent* to the *commencement* of the construction * * * or work aforesaid," the court held that the mechanic's lien was paramount in that case, following the decision in *Lampson vs. Bowen,* 41 Wis., 484. Judge Newman said:

> "The condition of the building, its unfinished state, was *notice* to the plaintiff (mortgagee), within the contemplation of the law, that further expenses for the completion of the building for its original purpose as a mill were in contemplation, which in some contingency, not remotely likely to happen, might eventuate in a lien which would be *prior and paramount* to the lien of his mortgage." (Pages 614-15.)

See Fitzgerald vs. Walsh (Wis.), 82 N. W., 717.

In speaking of the character and effect of a mechanic's lien in *Rees vs. Ludington,* 13 Wis., 276-81, it is said:

> "The design was to give to the mechanic a lien from the commencement of the building, equal in power and effect with the lien of another creditor who had obtained and docketed a judgment. The legislature gave him all the advantages of a judgment both as to the legal and equitable estate of the owner."
>
> "The case stands as if the appellants had at the time the building was commenced been judgment creditors of Hull whose judgments were a lien upon his equitable interests in the premises. If having been such judgment creditors their liens would have been prior to that of the respondent's mortgage, then they are now. But if not then, they are subsequent and must be postponed to the lien of the mortgage."

In *McCoy vs. Quick,* 30 Wis., 521-8, in speaking of a mechanic's lien judgment it was held: "That the effect of the lien judgment is the same, as against these defendants, as would have been the effect of a mortgage on the same premises" for the same amount duly executed by the owner and recorded on the day of the commencement of the construction of the building.

In *Whitney vs. Higgins,* 10 Cal., 547, which was an action brought to redeem by the purchasers of premises under a mortgage foreclosure against the purchaser of the same premises under a judgment in a suit brought to enforce a mechanic's lien, Justice Field, delivering the opinion of the court, said:

> "The conveyance to the plaintiff took effect by relation at the date of the mortgage, the 21st of February, 1856. By

it the plaintiff acquired all the estate which the mortgagor possessed in the property on that day. He therefore stands in precisely the same position as though he had purchased the property of the mortgagor at that time."

He further said:

"Though the lien of mechanics is purely the creature of the statute, a decree for the sale of the premises in its enforcement has the same and no greater effect upon the rights of purchasers and encumbrancers, prior to the commencement of suit, than a similar decree would have upon the foreclosure of a mortgage. * * * The plaintiff by his purchase took the title as it existed in the mortgagor at the date of the mortgage. His position in court therefore is that of the owner of the legal title, subject to the mechanic's lien. * * * If an encumbrancer prior to the suit brought, not being made a party, is entitled to redeem, *a fortiori* is a purchaser of the entire estate subsequent to the lien, and before suit, entitled to make a redemption."

It will thus be seen that the title acquired by the plaintiff in error at the sale under the mechanic's lien decree was precisely the same as though it had become the purchaser under a judgment docketed against the Oconto Water Company on the 15th day of September, 1890, or a purchaser at the sale under a decree foreclosing a mortgage executed to it by the Oconto Water Company and recorded on the 15th day of September, 1890; or, *as though it had obtained a valid deed of conveyance from the Oconto Water Company on the 15th day of September,* 1890. If the Oconto Water Company, at any time before the commencement of the proceedings in June, 1891, to foreclose the mortgage given to Andrews and Whitcomb, had the right to convey its property, then the plaintiff in error having obtained a valid lien against the property of the Oconto Water Company prior to that date, which lien has since by valid proceedings ripened into a title good as against the Oconto Water Company, has as valid a title as though the Oconto Water Company had on the 15th day of September, 1890, conveyed to it the interest which it then held in the premises. It has succeeded to the title that the Oconto Water Company possessed, inasmuch as the mortgage foreclosure proceedings, having been taken without making it a party defendant, were as to it inoperative and void.

Hodson vs. Treat, 7 Wis., 263.

Green vs. Dixon, 9 Wis., 532.

Boggs vs. Fowler, 16 Cal., 559.
Title G. & T. Co. vs. Studebaker, 100 Fed. R., 358.

In *Atkins vs. Volmer*, 21 Fed. 697, Judge Nelson held that the foreclosure of a mortgage did not cut off the rights of the holder of a mechanic's lien which, by decree foreclosing the same, rendered after the mortgage was given, was adjudged to commence as of a date prior to the mortgage, altthough the mortgagee had no knowledge of the existence of such lien or of the proceedings to enforce the same before his mortgage was filed of record, such holder of a mechanic's lien not having been made a party to such foreclosure proceedings.

In *Noyes vs. Hall*, 97 U. S., 34, it was held that one in the possession of lands under contract not recorded, must be made party defendant to the mortgage foreclosure suit in order to cut off his right of redemption as against a purchaser at the mortgage foreclosure sale.

> "Parties interested in the premises who were not served with process are not bound by that decree, and it follows that the respondent took his title subject to the rights of the complainant acquired under the deed, just the same as if no such decree had ever been made."

In *Stout vs. Lye*, 103 U. S., 66, it was held that it was not necessary to make a creditor a defendant to a suit foreclosing a mortgage in order to cut off his lien against the equity of redemption of the mortgagor, where such creditor did not obtain his judgment until after the commencement of the foreclosure proceedings, although such judgment when obtained, under the statute of Ohio, bound the land of the defendant from the first day of the term of court at which the judgment was rendered, which antedated the date of the mortgage. The court said that "his encumbrance was actually *created* while the suit was pending," and that when the suit was begun, the creditor was a mere creditor at large, without interest in the property and without any right to defend the action if made a party defendant thereto. It was held that "this encumbrance was *created pendente lite*."

This case does not conflict with the principle for which we are contending, as under the statutes and decisions of Wisconsin a mechanic's lien is created from the date of the commencement of the work of construction, with precisely the same effect as

though it had been a judgment docketed or a mortgage or deed executed and recorded on that day. The encumbrance here was created by the furnishing of the material, had been kept alive by the filing of the claim for a lien in the public records, proceedings in equity to enforce and foreclose the same had been commenced in a court acquiring exclusive jurisdiction of the *res*, the attorney of the mortgagees had appeared for the owner and mortgagor and had filed its answer in the mechanic's lien foreclosure proceedings, contesting the same, the mortgagees had actual notice of all these facts when they commenced the foreclosure proceedings. Certainly it cannot be said that the plaintiff in error was a mere creditor at large, or that its encumbrance was not created until its decree had been entered. Had it not been delayed by the defense so interposed, it would have obtained its decree prior to the commencement of the mortgage foreclosure suit.

X.

The title of the plaintiff in error is based upon the contract which it made with the Oconto Water Company on the 28th day of August, 1890, and upon the mechanic's lien statute of Wisconsin as then construed by the state court, and subsequently construed by the federal court in the mechanic's lien foreclosure suit, and such contract and statutory right could not be taken away or impaired by any change of the statute whether by legislative enactment or judicial construction.

The law in existence when a contract is made enters into and becomes a part of such contract and becomes a rule of property.

Brine vs. Insurance Company, 96 U. S., 627.
2 Jones on Mortgages, §1051.

"The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution and is therefore void."

Walker vs. Whitehead, 16 Wall., 314-17-18.
See *Barnitz vs. Beverley*, 163 U. S., 118-125, 126.

Green vs. Biddle, 8 Wheat. 1-92.
Peninsular L. & C. W. vs. Paint Company, 100 Wis., 488.
Wright L. Co. vs. Hixon, 105 Wis., 153.

The title of the plaintiff in error is based upon its contract of August 28, 1890, with the Oconto Water Company and its lien under the statutes of Wisconsin dating from the 15th day of September, 1890, which antedate the execution and delivery of the mortgages to Andrew and Whitcomb. (See Record, p. 141.) This contract right and this lien were vasted interests which have never been foreclosed or divested.

The construction given by a court of the state to its statute becomes a part of the statute as though such decision was in terms written therein. The mechanic's lien statute had been construed by the Supreme Court of Wisconsin to give a lien to a party doing work or furnishing material in the construction of a building or other structure for a *quasi* public corporation.

Hill vs. R. R. Co., 11 Wis., 214.
La Crosse & M. R. R. vs. Vanderpool, 11 Wis., 119.
See *Carney vs. R. R. Co.*, 15 Wis., 503.
Vanderpool vs. La Crosse & M. R. R. Co., 44 Wis., 652.
Purtell vs. C. F. & B. Co., 74 Wis., 132.

If it be claimed that the Supreme Court of the state had not given a construction to the mechanic's lien statute at the time of the making of the contract and the commencement of the work of the construction of the plant so as to entitle the plaintiff in error to a vested lien under the statute, yet such construction was given by the Federal Court sitting in the Eastern District of Wisconsin and subsequently affirmed by the Court of Appeals. The rule is established "that the judgments of the United States Courts of the the Wisconsin Districts are to be treated as domestic judgments of the Superior Court of this state." "United States Courts are not foreign within the state where they are held." "In this proceeding the judgment of the plaintiff will have the same effect as if rendered by any Superior Court of this state because it was rendered in a Wisconsin district of a United States Court."

Ballin vs. Loeb, 78 Wis., 404, 413, 414.

To the same effect see

Metcalf vs. Watertown, 153 U. S., 671.

The federal court wrote into the state statute the right to a lien with like effect as though written in by the state Supreme Court.

No question affecting the validity of such lien or the right of the plaintiff in error to proceed to perfect the same by securing whatever title the Oconto Company had on the 15th day of September, 1890, could at any time have been raised down to the time of the decision on February 5, 1895, of the case of *Chapman Valve Mfg. Co. vs. Oconto Water Company*, 89 Wis., 264. The plaintiff in error having secured a valid interest in the property of the Oconto Water Company, no act of the legislature or decision of any court could destroy such right or the title to be secured by the enforcement thereof. If the legislature could not have taken away the right which had become vested in the plaintiff in error to foreclose its valid lien against and acquire the title of the Oconto Water Company by due proceedings to enforce the decree, no like result can be accomplished by the decision of any Court. Contract rights and the remedy to enforce the same can not be divested by any change in the judicial construction of a statute.

> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective but not retroactive."

Chief Justice Waite in *Douglas vs. County of Pike*, 101 U. S., 677-87. This doctrine has not been overruled.

See Taylor vs. Ypsilanti, 105 Id., 60-72.
County of Ralls vs. Douglas, 105 Id., 728-32.
Burgess vs. Seligman, 107 U. S., 20-35.
Green vs. Conness, 109 U. S., 104-105.
Anderson vs. Santa Anna, 116 U. S., 356-62.
German Bk. vs. Franklin Co., 128 U. S., 526-38-9.
Knox Co. vs. Bank, 147 Id., 91-99.
Union Bank vs. Board, 90 Fed. R., 7.
Wade vs. Travis Co., 174 U. S., 499-509.

XI.

RES ADJUDICATA.

The sixth finding of fact finds that the decree of the 29th day of July, 1897, was entered in the United States Circuit Court in accordance with the mandate of the Circuit Court of Appeals, which decree has never been modified or altered. (Record pp. 31-32.)

It is not essential, even it be competent, to go back of this final decree of July 29, 1897, to determine what was decided by the Court of Appeals from the opinions filed. Such final decree is unambiguous and as entered is binding on the parties even though it failed to conform to or was contrary to the mandate of the Court of Appeals.

Metcalf vs. Watertown, 34 U. S., App., 107.

It would certainly control as against any *obiter dicta* or inaccuracies or immaterial issues discussed in the opinions filed.

If the Circuit Court misconstrued the mandate or failed to give full and correct force thereto, its action would be binding upon the parties and upon all courts unless corrected by appeal or mandamus.

In re Sandford F. & T. Co., 160 U. S., 247.

What then was the former decision of the federal court?

There must be read into the final decree of July 29, 1897, such portions of the decree of July 17, 1895, as were adjudged to stand as entered after the cause came on to be reheard before the Circuit Court upon the record and mandates of the Court of Appeals. Such final decree so entered and read bound the defendant in error as well as all other parties thereto and adjudged as follows:

1. The property and effects of the Oconto Water Company were sequestered and a distribution of the same or the proceeds thereof was ordered made among its creditors *according to law and in the order of their priority.*

2. The plaintiff in error was adjudged a lien upon all the rights, franchises and property of the Oconto Water Company and the plant constructed by such company in the city of Oconto pursuant to and as provided in its mechanic's lien decree.

3. Said mechanic's lien was adjudged valid and effectual and ordered to be enforced, as a lien *prior* to that of the instrument claimed to be a mortgage bearing date September 13, 1890, under which Andrews and Whitcomb asserted their right to a lien upon the franchises and property of the Oconto Water Company, and as superior and *paramount* to any and all other liens or rights of Andrews and Whitcomb upon or in such franchises and property, including the so-called mortgage of March 13, 1891.

4. The plaintiff in error was thereby *authorized to proceed to the enforcement and satisfaction of its mechanic's lien upon* and *against the franchises and property* of the Oconto Water Company in accordance with and as provided in its decree establishing the same.

5. Defendant in error was required to pay the sum of twenty-five hundred dollars ($2500) adjudged to be paid in the decree of July 17, 1895, to Albert E. Smith, receiver of the Oconto Water Company, balance of compensation due him, and his counsel, as such receiver.

6. The clerk of the court was directed to restore to the defendants Andrews and Whitcomb the possession of the mortgage bonds without adjudging the validity or invalidity of the same or their issue by the Oconto Water Company.

7. The defendant, George W. Sturtevant, Jr., was adjudged to pay any deficiency that should be found due to the plaintiff in error, if any there should be, after applying to the satisfaction of its lien decree theretofore adjudged against the Oconto Water Company the proceeds of the sale made thereunder, the *amount of such deficiency being made to appear to the satisfaction of the court, and an order for such payment entered at the foot of the decree after the amount of such deficiency should be ascertained.*

8. The *legal title* to the land upon which the pumping station and well of the water works plant were located which, by deed dated January 31, 1894, was conveyed by the order of the court by the city of Oconto to the Oconto Water Company, a description of which lands was set forth, was passed and transferred by virtue of the instruments of mortgage dated September 13, 1890, and March 13, 1891, and by the sale in the proceedings to foreclose the same to the defendant in error *as assignee and successor in interest of Andrews and Whitcomb,*

but without prejudice to any rights which the plaintiff in error may have under its mechanic's lien decree or otherwise to redeem from such instruments of mortgage or either of them, or from the sale under the proceedings to foreclose the same. (Record pp. 140-146.)

The decree did not purport to pass but plainly excluded from its terms, not only the *equitable* title to the land, but the plant itself and the franchise of operating the same. This equitable title to the land was what the Oconto Water Company had when the mechanic's lien accrued and it was this equitable and substantial title that was held subject to the lien.

A decree in equity in the United States Court does not in itself transfer or convey title to real estate. The legal title remains as before the decree unless the parties make the necessary conveyance in accordance with the terms of the decree.

Gay vs. Parpart, 106 U. S., 679.

Hart vs. Sansom, 110 U. S., 151.

If, however, there be a statute in the state where the land is situated providing that such decree shall have the same operation and effect as if the conveyance ordered thereby had been executed conformably to such decree, the federal court sitting in that state will enforce such provision of the statute.

Langdon vs. Sherwood 124 U. S., 74.

There is no such provision in the statutes of Wisconsin, and there being no evidence that a deed was made by either the Oconto Water Company or its receiver to the defendant in error as directed by the decree on final hearing, the legal title to the premises did not by force of such decree vest in the defendant in error. Such legal title remaining in the Oconto Water Company would pass under the provisions of the decree providing that all property of the Oconto Water Company should be distributed "among its creditors according to law and in the order of their priority," and in accordance with the decree authorizing and directing the plaintiff in error to proceed to sell under its mechanic's lien decree.

Furthermore this part of the decree was unsupported by and beyond any allegations in or issues made by the pleadings and was not authorized by any affirmative relief asked in the pleadings on the part of either Andrews and Whitcomb

or the defendant in error, and so far as it may be claimed as passing any title subject to the right of redemption to the defendant in error it would be without jurisdiction and void.

Reynolds vs. Stockton, 140 U. S., 254, and cases cited.

But as directed by the provisions of this final decree of July 29, 1897, which was binding upon the defendant in error, the marshal proceeded to advertise and sell and to execute his deed upon such sale to the plaintiff in error of the entire water works plant of the Oconto Water Company, and the franchise of maintaining and operating the same.

The sale was confirmed, and the title and right of possession were thereby given to the plaintiff in error.

Dennison vs. U. S., 168 U. S., 241-9.

Was such decree of July 29, 1897, therefore, a bar to this action?

Where as in this case the second action is based upon a different claim or demand, the decree in the prior action operates as an estoppel only as to those *matters in issue* or *point controverted* upon the *determination* of which the finding or judgment was rendered.

The question is "was the right, question or fact distinctly put in issue and directly determined," in the former action.

So. Pac. Co. vs. U. S., 168 U. S., 1.

"Upon a plea of a former decree so much of the former bill and answer must be set forth as is necessary to show that the same point was then in issue."

Story's Eq. Pl., §791.

"As a plea of this kind proceeds upon the ground that the same matter was in issue in the former suit, and as every plea that is set up as a bar must be *ad idem*, the plea should set forth so much of the former bill and answer as will suffice to show that the same point was then in issue and should aver that the allegations as to the title to relief were the same in the second bill as in the first."

1 *Daniels Ch. Pl. & Pr. 5th Ed.*, §661.

Under this rule the answer in this case was not sufficient to support a decree of res adjudicata.

Washington R. R. vs. Bradley, 10 Wal., 299-303.

Furthermore if there be an uncertainty as to what was necessarily involved and decided in a case where several defenses were made and judgment given for defendant or if the complaint contained more than one count and judgment was for plaintiff, the whole subject is open for disposition and no estoppel exists.

Russell vs. Place, 94 U. S., 606.

Bellville Ry. Co. vs. Leathe, 84 Fed., 103 (7 Cir. Ct. App.)

"Every decree in a suit in equity must be considered in connection with the pleadings and if its language is broader than is required it will be limited by construction so that its effect shall be such and such only as is needed for the purposes of the case that has been made and the issues that have been decided." (Citing *Graham vs. R. R. Co.*, 3 Wall., 704.)

Barnes vs. Ry Co., 122 U. S., 1, p. 14.

Reynolds vs. Stockton, 140 U. S., 254-70-1.

The question therefore is whether the issue presented here was raised by the pleadings and determined by the decree of the court in the former action.

It will be admitted that the question of the jurisdiction of the state court to order a sale of the property, confirm the same and transfer the title and possession to the purchaser at the sale was not actually raised, argued, considered or determined in the former action. Was that a question or matter in issue? The former action was originally brought as a creditor's bill after execution returned unsatisfied in which it was alleged that Andrews and Whitcomb had obtained their contracts or mortgages in fraud of the rights of the complainant and therefore such mortgages were void and the prayer of the bill, among other things, was that they be so adjudged. The bill was also framed to recover judgment against Andrews and Whitcomb as stockholders upon the theory that they had failed to pay for the stock which they had received and held. (The bill was not offered in evidence and perhaps can not be considered here.) The answer of Andrews and Whitcomb set forth the execution of the mortgages together with facts tending to show their validity and the amount due thereunder and also facts tend-

ing to show that they held the stock of the company merely as collateral security from the company and not as absolute owners of the same. The answer also set forth the commencement of an action by them to foreclose two of their mortgages, the judgment entered, the sale, the bill of sale given by the referee, and the taking of possession of the water plant as purchasers at the sale. The defendant, Oconto City Water Supply Co., did not appear nor serve any answer. There seemed to be no evidence that it was served with process. The answer of Andrews and Whitcomb denied that the Oconto City Water Supply Company was a corporation. Subsequently the complainant amended its bill by alleging that after the filing of the bill the Oconto City Water Supply Company had been organized under the laws of Wisconsin and *claimed* to own or have some interest in or title to the rights and property of the Oconto Water Company which *claim* was alleged to be *subsequent to the lien* of the complainant. (Rec. p. 129-130.) Subsequently and after the entry of the mechanic's lien decree the bill of complaint was amended so as to allege the date of the contract with the complainant, the furnishing of the material, the filing of the lien, the entry of the decree for enforcement of the lien and that said lien was a first lien upon the property "and entitled to *priority* over all other *liens* asserted by or on behalf of any of said defendants."

Andrews and Whitcomb answered such amendments by alleging that they were not parties to the suit brought to enforce the mechanic's lien; that as to them the action had not been brought by the complainant within the time permitted by the statutes of Wisconsin and that the limitation of the statutes was a bar to the complainant's claim for a lien upon the property as against them and that the mechanic's lien decree was not binding upon them because there was then no law in force in the state of Wisconsin giving the complainant a lien upon the property mentioned in the mechanic's lien decree. (Record pp. 136-7.)

The issues thus raised by the pleadings were:

First. Had the complainant a valid lien as against the Oconto Water Company with the right to proceed to enforce the same by sale of the property.

Second. Was the mechanic's lien decree binding upon the defendants Andrews and Whitcomb as privies to the defendant Oconto Water Company so as to cut off or defeat their rights as mortgage creditors under their mortgage dated September 13, 1890.

Third. Was the complainant entitled to a personal judgment against Andrews and Whitcomb on account of the stock held by them being unpaid.

Fourth. Was the mechanic's lien of the complainant prior in time to that of the first mortgage of Andrews and Whitcomb.

The court determined:

First. That the mechanic's lien decree was valid as rendered against the Oconto Water Company, and the complainant was entitled to proceed to its enforcement.

Second. Andrews and Whitcomb as mortgage creditors were not bound as privies to the mechanic's lien decree so that their rights under their mortgage dated September 13, 1890, were not cut off by the mechanic's lien decree which *as such mortgagees* they could dispute.

Third. Andrews and Whitcomb as stockholders were not liable to the unsecured creditors of the Oconto Water Company inasmuch as they received and held the stock from the Oconto Water Company direct as collateral security for a debt owing by the Oconto Water Company to them.

Fourth. The lien of the complainant was *prior* to that of the lien of the mortgage of Andrews and Whitcomb dated September 13, 1890.

The bill was dismissed only as to the defendant's appealing, and not as to them in all respects.

It will be seen that inasmuch as there was no cross bill filed or affirmative relief asked as to any of these questions none was given. The issue was one relating to *liens* not to *titles*. Such issue was between the complainant and Andrews and Whitcomb. No issue was formed between the complainant and the Oconto City Water Supply Company. The defendant in error asserted no claim of title to the property. It filed no answer but was in default under the allegation of the bill that it claimed to have *some* interest or title to the property of the Oconto Water Company which claim was

subsequent to the lien of the complainant. Andrews and Whitcomb in their answer asserted that they had ceased to be mortgagees and ceased to have any title to or possession of the property sold to them except the stock and bonds of the company, but alleged that the Oconto City Water Supply Company had the title and possession of the plant and property as assignees of the franchise. The only issue therefore raised by their answer related to the validity and priority of their mortgage liens as against the mechanic's lien of the complainant. Under the allegations of the bill and answer putting in issue the question of the validity of their mortgages, it was held that whether or not their mortgages were prior or subsequent to the date of the mechanic's lien of the complainant they had the right to contest the validity and binding effect of such lien as against them, they not having been made parties to the mechanic's lien foreclosure suit so as to be deprived of their rights and claims as mortgage creditors. The court held that as against their first mortgage the mechanic's lien was not binding inasmuch as subsequent to the entry of the complainant's decree the Supreme Court of the State of Wisconsin had decided that the statutes gave no lien and that being the then existing law of the state the federal court would follow such construction of the statute as against their mortgage, they not having been parties to and not bound by the mechanic's lien decree. The only decision made was that the complainant could not enforce its lien against the mortgage lien of Andrews and Whitcomb. The question here is, has the plaintiff in error a title now as against the claim of title of the defendant in error?

XII.

Undue effect and credit were given to the former decree in the Federal Court.

Both the trial court and the Supreme Court held that the decree in the former action decided against the title of the plaintiff and that plaintiff was not entitled to any lien on the property in controversy and that defendant was the owner and holder of the property, free and clear of any claim of the plaintiff. (Record p. 185.)

This decision was put upon the ground that where facts pleaded as a defense, when established, are effectual to defeat the plaintiff's cause of action without any affirmative relief, then a judgment formally adjudicating the existence of such facts, or the effect of them, is always proper. This reasoning however, does not reach the question involved. The defendant in error was in default in the former action where the bill alleged as against it merely that it claimed some right in the property which was *subsequent* to the lien of the complainant. There was no allegation in the bill and no answer of the defendant in error that it claimed a *prior or paramount* right or title to the property upon which the complainant claimed a lien. Whatever rights the defendant in error had were, in fact, derived from Andrews and Whitcomb, and as they obtained no title to or right of possession of the property under their foreclosure decree and sale, the defendant in error succeeded if in any respect by assignment merely to their rights as mortgage creditors. As such mortgage creditors the court held that they had a right to dispute the complainant's lien, and as to them such lien was not enforcible under the statutes of Wisconsin as then construed by the Chapman Valve case. The appeal was not dismissed as to the defendant in error upon the ground that it had a paramount title which it held free and clear of any claim of the plaintiff in error.

"A matter in issue" has been defined in a case of leading authority as "that matter upon which the plaintiff proceeds by his action and which the defendant controverts by his pleading."

Reynolds vs. Stockton, 140 U. S., 254-270.

> "The rule is universal that where he (defendant) appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue."
>
> A decree in equity which is entirely aside of the issue raised in the record is invalid and will be treated as a nullity even in a collateral proceeding."
>
> *Idem, supra*, p. 266.

It will thus be seen that there was no issue in the former action upon which the court could base a decree in that case that the defendant in error held and owned the plant and prop-

erty of the Oconto Water Company by claim and title paramount to and free and clear of any claim or lien of the plaintiff in error. The decree in that case did not, in fact, so adjudge, and hence there was no ground upon which the court in this case could so hold and adjudge.

The court could not adjudge to the defendant in error an absolute and paramount title, free and clear of any claim, title or right of redemption on the part of the plaintiff in error unless such matter was in issue, and unless the defendant in error had, by cross bill, sought such affirmative relief.

Mays vs. Pryce, 95 Mo., 603-14.

"A judgment by default is conclusive of all that is properly alleged in the complaint, but nothing more, and as a general rule, only upon the defendant in the character in which he is sued."

Unfried vs. Heberer, 63 Ind., 67-72.

The defendant was sued in the character of a subsequent lienholder.

"It is only when the particular property or right which has been transferred is affirmatively shown to have been the subject-matter of the former litigation and its status settled thereby, that the effect of that litigation is conclusive upon a grantee or transferee of property."

Grunert vs. Spalding, 104 Wis., 193-225.

Hart vs. Moulton, 104 Wis., 349.

Under this doctrine, the defendant in error succeeded only to the right which Andrews and Whitcomb had as mortgagees to contest the lien of the plaintiff in error. That was the only material question raised and determined in the former action under the issue presented by the bill of the complainant, and controverted by the responsive allegations in the answer of Andrews and Whitcomb.

"In order to give a judgment rendered by even a court of general jurisdiction the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be *responsive to the issues tendered by the pleadings.*

Reynolds vs. Stockton; supra, p. 270.

An action brought to set aside proceedings on foreclosure of a mortgage in which the defendant, purchaser at the sale,

did not seek affirmative relief but rested upon pure defense, is not a bar to an action instituted by the defendant in the former action against the plaintiff therein for possession of the premises, in as much as the determination of the issues in one does not determine the issues in the other.

Piper vs. Sawyer, (Minn.), 85 N. W., 206-7.

The final decree in the former action reserved to the plaintiff in error the right to redeem from the mortgage to Andrews & Whitcomb without prejudice on account of the decree undertaking to pass the legal title to the land to the defendant in error. Can it be claimed that the court in this action could cut off this right of redemption by adjudging that the defendant in error owned the water plant "free and clear of any claim or lien of the plaintiff"? If so, the judgment would bar any action which might be brought by the plaintiff in error to redeem from the mortgage, or to be subrogated to the rights thereunder. Certainly if the plaintiff in error can not compel the defendant in error to surrender possession of the property or to pay and redeem its lien, it ought not by the judgment of the state court to lose its right to redeem from the mortgage and be thereby subrogated to the title of the defendant in error.

A judgment of default against a party defendant is an admission of the truth of the allegation in the complaint made against such party.

"The bill when confessed by the default of the defendant is taken to be true in all matters alleged with sufficient certainty."

Thomson vs. Wooster, 114 U. S., 104-111.

Last Chance Mining Co. vs. Tyler Mining Co., 157 U. S., 683.

Hefner vs. N. W. L. Ins. Co., 123 U. S., 747.

Reynolds vs. Stockton, 140 U. S., 254.

"The complaint alleged in effect that the appellants had or claimed to have some interest in or lien upon the premises, but which, if any, was subsequent to the lien of the plaintiff and accrued on or after September 11, 1888; and *hence tendered no issue respecting any prior outstanding paramount title.*"

Cook vs. Goodyear, 79 Wis., 606-11.

Gilchrist vs. Foxen, 95 Wis., 428.

If no such issue was tendered the dismissal of the bill as to the defendant in error would certainly not adjudicate that it held a paramount title to the property.

We submit, therefore, that the court below erred in holding that "respondent is *legally* in possession of the mortgage property," that the plaintiff in error holds a "*junior* lien" instead of a *prior* title, and that the "legal effect" of the alleged former adjudication was that defendant in error "was the *owner* and holder of the property *free and clear of any claim* of the plaintiff."

GEO. H. NOYES,
Counsel for plaintiff in error.

Milwaukee, Wis., March 10, 1901.